No. 06-516

Supreme Court, U.S.
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In The Supreme Court of the United States

**DWAYNE ROSS, MARIA ROSS,
Individually and as Next Friends of
SYDNEY ROSS and JOHNATHON ROSS, Minor Children;
SYDNEY ROSS, Minor Child;
JOHNATHON ROSS, Minor Child,**

Petitioners,

v.

**ALLSTATE TEXAS LLOYDS
INSURANCE COMPANY,**

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After a judgment was entered against Kent Mathews, he asked his insurer, Allstate Texas Lloyds Insurance Company to post a supersedeas bond to protect him from the judgment. Allstate refused. To protect himself, Mathews entered into an agreement whereby he assigned his bad faith action against Allstate to the plaintiffs and dismissed his appeal. To protect its own coverage interests, Allstate sought to intervene post-judgment to pursue the appeal. The district court denied Allstate's motion to intervene. The Fifth Circuit panel held that the district court was required to grant Allstate's motion to intervene **as a matter of right**, and to appeal the case on the merits, without being a party to the judgment and without posting a supersedeas bond.

Several questions are raised concerning the proper construction of Rule 24(a) of the Federal Rules of Civil Procedure:

- Does Rule 24(a) require a district court to grant a non–party insurance company's motion to intervene as a matter of right when that insurance company asserts only a contingent interest in the judgment?

- Does Rule 24(a) require a district court to grant a non-party insurance company's motion to intervene as a matter of right when that insurance company can fully protect its interests in a separate pending coverage lawsuit?

- Does Rule 24(a) require a district court to grant a non-party insurance company's motion to intervene as a matter of right when that insurance company was not the real party of interest and was not in privity with its insured?

- [unbriefed issue] Did the district court abuse its discretion by denying Allstate's post-judgment motion to intervene as untimely?

PARTIES TO THE PROCEEDING BELOW

Petitioners Dwayne Ross and Maria Ross appeared individually and as next friends of their children, Sydney Ross and Johnathan Ross, and were the Plaintiffs/Appellees below.

Respondent Allstate Texas Lloyds Insurance Company was not a party to the proceedings in the district court but was the Appellant below.

Kent Mathews, Allstate's insured, was the Defendant in the district court, but did not pursue an appeal from the judgment. He was not a party to the proceedings in the court of appeals and is not a party here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 21, 2005.

OPINIONS BELOW

The opinion issued by the United States Court of Appeals for the Fifth Circuit is reported as *Ross v. Marshall*, 426 F.3d 745 (5th Cir. 2005), and is reproduced in the Appendix at App. 1. The order issued by the United States Court of Appeals for the Fifth Circuit that denied rehearing is reported as *Ross v. Marshall*, 456 F.3d 442 (5th Cir. 2006), and is reproduced in the Appendix at App. 2. The Amended Final Judgment from the United States District Court for the Southern District of Texas entered on August 20, 2003 is reproduced in the Appendix at App. 3. The United States District Court for the Southern District of Texas' Order denying the motion to intervene entered on September 15, 2003 is reproduced in the Appendix at App. 4.

JURISDICTION

The Court has jurisdiction to review a civil judgment pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Fifth Circuit entered judgment on September 21, 2005, and denied the Petitioners' motion for rehearing on July 11, 2006.

RULE INVOLVED

This case involves the construction of Rule 24(a) of the Federal Rules of Civil Procedure, which reads:

Rule 24. Intervenors

> (a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties.

STATEMENT OF THE CASE

Plaintiffs, a family of African-Americans, brought suit against Kent Mathews and his son, Wayne Mathews, and four other defendants for conduct that led to a cross burning in the Plaintiffs' yard on June 19, 2000.

Allstate insured both Kent Mathews and Wayne Mathews under a homeowners' insurance policy. However, Allstate refused to provide a defense to Wayne Mathews. Allstate did provide a defense to Kent Mathews under a reservation of rights, but on March 12, 2002, Allstate filed a separate declaratory judgment action, and contended that the homeowners' policy provided no coverage for either Kent

Mathews or Wayne Mathews. Allstate's separate coverage suit, styled *Allstate Texas Lloyds Insurance Company v. Wayne Gordon Mathews, et al.*, Civil Action No. H-02-0964, remains pending in the Southern District of Texas federal court.

On May 28, 2003, after a jury trial, the district court entered Final Judgment in which it imposed liability against all defendants except for Kent Mathews (CR 2666). On August 20, 2003, on reconsideration, the district court entered an Amended Final Judgment in which it found all defendants (including Kent Mathews) liable for actual damages, and the other defendants (except for Kent Mathews) liable for exemplary damages (CR 2792, 2845).

Allstate was not a party to the tort action brought against its insured. Texas is not a direct action state, so Allstate **could not** be a party to the tort action against its insured. *See* TEX. R. CIV. P. 51(b)(prohibits joinder of insurance company in third party suit against insured); *Russell v. Hartford Cas. Ins. Co.*, 548 S.W.2d 737, 740 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

Consequently, Allstate could not be, and was not, named in the judgment. Thus, Allstate is not directly liable for the judgment.

As the panel recognized, the only way that Allstate could ever be liable for that judgment was **IF** the court found in the separate suit that Allstate provided coverage to Kent and Wayne Mathews (for liability up to policy limits) and **IF** Allstate was found liable in the separate suit for bad faith settlement practices (for liability for extra-contractual damages). *See* App. 1, at 21-28 (citing cases).

Following that judgment, Allstate, which was not a party to the action, filed a motion to intervene, a post judgment "answer" (despite the fact that no one had alleged anything against it) and a notice of appeal. The basis of Allstate's motion to intervene was not to contest liability against its insured, but to "protect its monetary interest in the case." (CR 2845). When Allstate refused to post a supersedeas bond in the full amount of the judgment to protect its insured from execution on his assets during the pendency of the appeal,[1] Kent Mathews fired the defense counsel hired by Allstate and entered into an agreement with the Plaintiffs to delay execution while Plaintiffs sought recovery against Allstate in the separate suit.

On September 15, 2003, the district court denied Allstate's post-judgment motion to intervene, and struck its post-judgment answer and notice of appeal. On September 19, 2003, Allstate filed a notice of appeal from the district court's September 15, 2003 order.

On September 21, 2005, the panel of the United States Court of Appeals for the Fifth Circuit (Higginbotham, J., joined by Davis and Garza, JJ.) held that the district court erred in denying Allstate's intervention into the suit against its insured, holding that Allstate had satisfied all the requirements for intervention as a matter of right, under FED. R. CIV. P. 24(a). Then, rather than remand to the district court, the panel addressed the merits of the case, and reversed and rendered a take nothing judgment.

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[1] Allstate attempted to tender $300,000 (its policy limits) to supersede the over $10 million judgment, but the district judge denied that motion. Allstate never attempted to post a full supersedeas bond and Allstate has not appealed the district judge's denial of that motion.

The Ross family filed a petition for rehearing *en banc*. The Fifth Circuit considered it a petition for panel rehearing, and on July 11, 2006, denied the petition. App. 2.

REASONS FOR GRANTING THE WRIT

This case concerns the proper construction of Rule 24(a) of the Federal Rules of Civil Procedure—the rule that governs intervention in a civil action as a matter of right. Because this case involves the right of a non-party insurance company to intervene post-judgment in a suit against its insured, solely to protect the insurance company's own coverage interests, the case presents important and recurring issues for civil litigators and courts.

This Court has not addressed the substantive requirements of Rule 24(a) in over forty years.[2] The opinion

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[2] Modern Rule 24(a) was enacted by amendment in 1966. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134 n.3 (1967). In 1971, the Court analyzed the nature of the interest required for intervention as a matter of right in Rule 24(a) in *Donaldson v. United States.*, 400 U.S. 517, 531 (1971). And, in 1973, the Court analyzed the timeliness of intervention under both Rules 24(a) and 24(b) in *NAACP v. New York*, 413 U.S. 345, 365-69 (1973). Since that time, the Court has cited, but not directly addressed any of the requirements of Rule 24(a). *See, e.g., McConnell v. FEC*, 540 U.S. 93, 233 (2003) (not addressing requirements for intervention because the issue was standing); *Devlin v. Scardelletti*, 536 U.S. 1, 15 (2002) (holding objecting class member could appeal without intervening); *Venegas v. Mitchell*, 495 U.S. 82, 88 (1990) (permitting *permissive* intervention for contingent fee lawyer in §1983 case); *Martin v. Wilks*, 490 U.S. 755, 764-65 (1989) (holding Rule 19 joinder rather than voluntary intervention is required to bind someone to the judgment); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1988) (holding that order of permissive intervention was not appealable under collateral order doctrine); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 279 (1987) (holding that there was no appeal

below illustrates the confusion that courts face in construction of the rule. This is the first decision in the history of our nation's jurisprudence which ever allowed an insurer to intervene as a matter of right, post-judgment, in a lawsuit against its insured, for the sole purpose of minimizing its liability in a separate coverage action.[3]

Not only is the Fifth Circuit's panel's decision unprecedented, but it is also unsound. This case presents the Court with the unique opportunity to resolve the conflicts

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from Ninth Circuit's affirmance of district court's denial of intervention); *Local 93, Intern. Ass'n of Firefighters, AFL-CIO L.L.C. v. Cleveland*, 478 U.S. 501, 528 (1986) (noting intervention but it was not an issue in the case); *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (holding that physician's intervention in abortion case did not confer standing); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 548 (1986) (holding that parent had no standing to challenge prayer in school without intervention as parent); *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 315 (1985) (cites Rule 24(a) in discussion of *Donaldson v. United States.*, but not an issue in case); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350 n.4 (1983) (cites rule in discussion of rights of putative class members); *Milliken v. Bradley*, 418 U.S. 717, 730 n.12 (1974) (noting that district court permitted intervention, but not an issue in case); *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 559 (1974) (holding that statute of limitation for those who seek to intervene in class action is tolled when the class action is commenced); *Zahn v. International Paper Co.*, 414 U.S. 291, 306 (1973) (noting in dicta that courts have exercised ancillary jurisdiction over intervention).

[3] *See Bolden v. O'Connor Cafe of Worcester, Inc.*, 50 Mass. App. Ct. 56, 64 (Mass. App. Ct. 2000)("The [insurer] cites no comparable case, and we are aware of none, in which an entity was permitted to intervene as of right to defend its interest in another lawsuit.")(identical facts); *but see In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718 (Tex. 2006) (issued after opinion below, and relying on the Fifth Circuit's opinion here, to hold that a non-party insurance company could intervene in a mandamus proceeding).

among the courts of appeals and to provide guidance to the bench and bar on the limitations of Rule 24(a). Those issues are presented here in stark relief against the backdrop of a simple, straightforward record. Review should be granted.

I. Allstate Could Not Intervene As A Matter Of Right Because Its Interest Was Contingent.

The Fifth Circuit's opinion below is in direct and irreconcilable conflict with those opinions from other courts of appeals that have held that a person cannot intervene as a matter of right to protect a contingent interest. The interest Allstate sought to protect was its "monetary interest." *See* Allstate's Motion to Intervene, at 7-8 (CR 2845). And, as the Fifth Circuit acknowledged, that interest was not triggered in this suit. App. 1. Rather, in order for Allstate to be found liable for the judgment, there must be two contingencies: (1) it must be found to provide coverage for Kent Mathews and Wayne Mathews (for liability up to policy limits); and (2) it must be found liable for bad faith settlement practices (for extra-contractual liability). The Fifth Circuit conceded such contingencies, yet granted Allstate's intervention anyway.[4] Prior to the Fifth Circuit's opinion, **every other** court that considered this type of contingent interest has held that it is insufficient for intervention as a matter of right.

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[4] The Fifth Circuit held that "although some **contingency** remains in that Allstate may still avoid liability if it prevails in its coverage action, we find this **contingency** insufficient to preclude intervention." App. 1, at 26. The court also held, "While this interest [minimizing its potential exposure in a bad faith claim] **is also contingent** upon an adverse finding in a separate suit, Allstate may minimize or eliminate this exposure by contesting the judgment against Mathews on appeal." *Id.* at 26.

To intervene as a matter of right, the applicant must have "an interest relating to the property or transaction which is the subject of the action . . . ." FED. R. CIV. P. 24(a). This Court, in *Donaldson v. United States,* held that the applicant's interest must be "a significantly protectable interest." 400 U.S. 517, 531, 91 S. Ct. 534, 542, 27 L. Ed. 2d 580 (1971). Courts of appeals have described this interest as a "direct, substantial, legally protectable interest in the proceedings." *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463-464 (5th Cir. 1984)(citing cases). And, courts of appeals have held that a mere economic interest in the judgment is not enough to justify intervention as a matter of right. *Id.* at 464 ("By requiring that the applicant's interest be not only 'direct' and 'substantial,' but also 'legally protectable,' it is plain that something more than an economic interest is necessary. What is required is that the interest be one which the substantive law recognizes as belonging to or being owned by the applicant."). Further, intervention as a matter of right cannot rest on an interest that is remote or collateral to the main action. *See League of Latin American Citizens v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989); *see also* 6 MOORE'S FEDERAL PRACTICE, § 24.03[2][a] at 25-29 (3d ed. 1997).

Because an interest sufficient to justify intervention as a matter of right must be direct interest, it cannot be a contingent interest. *See, e.g., Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 22-23 (1951)(involving earlier rule) ("But we have said enough to show that the claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene"); *Public Serv. Co. of NH v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998)("a putative intervenor must show at a bare minimum that it has 'a significantly protectable interest,' ... that is 'direct, not contingent'"); *Restor-A-Dent*

Dental Laboratories, Inc. v. Certified Alloy Products, Inc., 725 F.2d 871, 874 (2d Cir. 1984)("Moreover, it is said that such an interest must be direct, as opposed to remote or contingent."); *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216 (3d Cir. 2005)("An interest contingent upon a favorable result in an associated lawsuit is not an interest sufficient to require intervention under Rule 24(a)."); *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002)("Thus, Reliant and Mirant are claiming a right to intervene based on a contingent, unsecured claim against a third-party debtor. This falls far short of the 'direct, non-contingent, substantial and legally protectable' interest required for intervention as a matter of right."); *In re Kaiser Steel Corp.*, 998 F.2d 783, 790-791 (10th Cir. 1993)("The mere existence of a third person's contingent interest in the outcome of pending litigation is insufficient to warrant intervention of right."); *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1310-1311 (11th Cir. 2004)("a nonparty must have a 'direct,' 'substantial,' and 'legally protectable' interest in the action rather than a merely speculative or contingent interest").

Other courts, applying the same rules as applied here, have denied intervention to insurers who sought to intervene as a matter of right to seek to protect their contingent liability interests. *See Bolden v. O'Connor Cafe of Worcester, Inc.*, 50 Mass. App. Ct. 56, 64 (Mass. App. Ct. 2000)[5] (identical facts to this case); *Kilian v. Montgomery Hosp.*, 1995 U.S. Dist. LEXIS 452, 3-5 (E.D. Pa. 1995)(insurer cannot intervene to challenge postjudgment interest awarded in the judgment); *see also In re Healthsouth Corp. Ins. Litigation*, 219 F.R.D. 688,

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[5] Massachusetts modeled its intervention statute after Rule 24, and looks to federal case law for guidance.

693 (N. D. Ala. 2004)(plaintiff could not intervene in insurer's coverage action for the same reasons).

The Fifth Circuit paid lip service to these requirements. App. 1, at 21. But, then, the court disregarded them. *Id.* ("*Despite these requirements*, we have observed that 'the interest test' is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."). However, even those cases relied upon by the Fifth Circuit for this proposition required—as this Court and other court of appeals opinions require—a direct, legally protectable interest, that is not remote nor contingent.[6]

On rehearing, the Fifth Circuit again paid lip service to the requirement of a direct interest. In fact, the Fifth Circuit acknowledged that when an insurer defends under a reservation of rights and reserves the right to challenge coverage later, its "interest is insufficient for intervention." App. 2, at 2. However, the Fifth Circuit attempted to distinguish that line of cases by saying that Allstate had only issued a "limited reservation of rights," because it accepted liability for Kent Mathews' negligent conduct.[7] That distinction cannot apply

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[6] The Fifth Circuit cited and acknowledged two opinions—one from the Second Circuit and one from the First Circuit that hold, unequivocally, that an insurer does not have a right to intervene in an insured's tort suit to protect the insurer's interest to minimize liability. *See* App. 1, at 21-24. The Fifth Circuit attempted to distinguish those cases—in our view unsatisfactorily –yet did not cite a single opinion that holds in favor of the Fifth Circuit's result.

[7] "Once Allstate accepted coverage over any negligence liability on the part of Kent Mathews, they had a direct interest in the liability lawsuit." App. at 2, at 3.

here because Kent Mathews' negligence played no part in this appeal. The jury answered "no" to Kent Mathews' negligence—a finding unchallenged by any party on appeal. The district court's judgment was based upon agency principles, a matter on which Allstate continues to contest coverage in its pending litigation. Thus, at the time of its intervention as a non-party to pursue an appeal to protect its own interests, Allstate had no direct interest in the judgment.

Because the Fifth Circuit's opinion conflicts with the opinions of this Court and of other courts of appeals, and does not follow the language of the rule or the case law, the opinion should be reviewed.

II. Allstate Could Not Intervene As A Matter Of Right Because Its Rights Can Be Resolved In A Separate Suit.

There is another related, yet independent reason why this Court should grant review. Well-settled law establishes that an applicant is not entitled to intervene as a matter of right where the applicant can protect its interests through a separate lawsuit.

A leading case on this subject is the Fifth Circuit's own *Deus v. Allstate Ins. Co.*, 15 F.3d 506 (5th Cir. 1994), *cert. denied*, 513 U.S. 1014 (1994). In that case, an Allstate agent sued Allstate for intentional infliction of emotional distress. While that suit was pending, a nonparty sought to intervene as a matter of right to gain access to sealed testimony and discovery. However, that nonparty was already participating in a lawsuit against Allstate in a federal court in Nevada. The court held: "Intervention generally is not appropriate where the applicant can protect its interests and/or recover on its claim

through some other means." *Id.* at 526 (citing *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir.), *cert. denied*, 400 U.S. 878, 91 S. Ct. 118, 27 L. Ed. 2d 115 (1970)). Because the nonparty already had a pending federal suit in which he could assert his interest, the court held that the district court properly denied intervention.

This sensible holding[8] comports with a long line of cases from other forums which held that one may not intervene as a matter of right if one can protect its interests in a separate suit. *See, e.g., Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216 (3d Cir. 2005)("a mere economic interest in the outcome of litigation is insufficient to support a motion to intervene. Thus, the mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give the third party a right to intervene."); *Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 564 F.2d 1343, 1346 (9th Cir. 1977)(holding that mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give the third party a right to intervene); *Shaunfield v. Citicorp Diners Club, Inc.*, 2005 U.S. Dist. LEXIS 11244, 16-18 (N.D. Tex. 2005)("Thus, the mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give the third party a right to intervene.").

The Fifth Circuit opinion here is in direct and irreconcilable conflict with that line of case. Allstate could not be liable for the judgment against its insureds, not with a separate coverage action pending in federal court. Rather, Allstate's liability would be determined in the second suit, in those series of contingencies acknowledged by the Fifth

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[8] Petitioners cited *Deus v. Allstate* in their Brief of Appellees, but the Fifth Circuit took no notice of it.

Circuit. Because Allstate could protect itself from liability in the second suit, Allstate had no right to intervene. This Court should take this opportunity to clarify the requirements of Rule 24(a) to provide guidance for courts and litigants.

III. Allstate Could Not Intervene As A Matter Of Right Because It Is Not Bound To The Judgment Against Its Insured.

Finally, regardless of the Fifth Circuit's paeans to the "practical" or "flexible" or "liberal" way of looking at the rules, this Court and the courts of appeals have clearly defined what constitutes a protectable interest sufficient to justify intervention as a matter of right. And, Allstate does not meet that requirement.

The clear principles were discussed in the Fifth Circuit's opinion in *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463-464 (5th Cir. 1984). Relying on this Court's authority, the Fifth Circuit held that the interest required is "one which the substantive law recognizes as belonging to or being owned by the applicant." *Id.* at 463. To show this, applicant must show that it is "the real party in interest." The real party in interest requirement of FED. R. CIV. P. 17(a) "applies to intervenors." *Id.*[9] And, also applicable to intervenors is the rule that "a party has no standing to assert a right if it is not his own." *Id.*

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[9] *See also* Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1543 at 646 ("... the real party in interest requirement ... must be satisfied for purposes of asserting ... a claim by an intervenor"); 3A MOORE'S FEDERAL PRACTICE, ¶ 17.07 at 17-77 (1982) ("Rule 17(a) applies to ... intervenors ...").

Here, Allstate sought to intervene to assert the rights to appeal a judgment against its insured. The Fifth Circuit mistakenly said that Allstate was in privity with the insured. It was not. Because Allstate was defending under a reservation of rights and had filed a separate coverage action against its insured in federal court—and, because it had abandoned its insured when it refused to post the full supersedeas bond to protect its insured's assets from execution on appeal—Allstate was not in privity with its insured. *See Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 826 (Tex. App.—Dallas 1992, writ denied); *Columbia Mut. Ins. Co. v. Fiesta Mart, Inc.*, 987 F.2d 1124, 1128 (5th Cir. 1993); *cf., Commercial Casualty Ins. Co. v. Fruin-Colnon Contracting Co.*, 32 F.2d 425, 427-428 (8th Cir. 1929)(holding an insurer liable for failing to protect its insured at all stages of the litigation, including the posting of a supersedeas bond). The reservation of rights letter provided the insured with notice of this conflict of interest between him and his insurer. *Rhodes v. Chicago Ins. Co., Div. of Interstate Nat. Corp.*, 719 F.2d 116, 121 (5th Cir. 1983).

The Fifth Circuit also mistakenly stated that Allstate did not need to intervene prior to judgment because the attorneys it hired to represent the insured were protecting Allstate's interest. That is also incorrect. Under Texas law, an attorney cannot serve two masters. He cannot protect the insurer's interests. *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973). The fact that there is a reservation of rights means that the attorney **cannot** work for the insurer, without violation of his ethical code. *Id.*

Finally, although muted in the opinion, the case law is clear that an insurer is **not bound** by a judgment against its insured. Where there is a reservation of rights, the only way the insurer is liable is **IF** coverage is found in a separate suit (for

liability for policy limits) and **IF** the insurer is found liable in the separate suit for bad faith settlement practices. *See* App. 1, at 23-28 (citing cases). And, Texas law is clear that the insurer is **not bound** based on waiver or estoppel or even based on recitations in the judgment against insured. *See Employers Cas. Co. v. Block*, 744 S.W.2d 940, 943 (Tex. 1988)("[W]e do not agree with [the court of appeals'] conclusion that the recitation in the agreed judgment that the damage resulted from an occurrence of August 6, 1980 is binding and conclusive against Employers Casualty in the present suit"); *Minnesota Mut. Life Ins. Co. v. Morse*, 487 S.W.2d 317, 320 (Tex.1972) ("waiver and estoppel cannot enlarge the risks covered by a policy and cannot be used to create a new and different contract with respect to the risk covered and the insurance extended.").

Thus, Allstate was not in privity with its insured. Allstate was not liable to pay the judgment (without findings in a separate suit). Allstate was **not bound** to the judgment, or any of the recitations in the opinion. Allstate did not have a legally protectable property interest in the judgment. Allstate was not a real party in interest.

While all this may sound like an esoteric, academic discussion about the proper construction of Rule 24(a), the Fifth Circuit's construction of the rule will have dramatic, practical effects on civil litigation. Henceforth, insurers will no longer need to post supersedeas bonds to appeal judgments against their insureds. With the Fifth Circuit opinion in hand, all an insurer need do is wait to see how the judgment comes out. If judgment is unfavorable to the insured, the insurer need do nothing to protect its insured. Rather, the insurer, as here, can abandon its insured and seek only to protect its own hide. The Fifth Circuit's opinion encourages the insurer to intervene post-judgment and, without posting any supersedeas bond, to

appeal the merits—permitting it a **super-appellant** status enjoyed by no other appellant. And, the insurer can do this with impunity because, under Texas law, a plaintiff cannot execute its judgment against the insurance company.

Thus, the Fifth Circuit's decision not only upsets the delicate balance between insurers and insureds, but is also so far out of the mainstream and in such conflict with other courts that it must be corrected. This is an opinion of exceptional importance which should be considered by the Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. (2) 06-516

In The Supreme Court of the United States

DWAYNE ROSS, MARIA ROSS,
Individually and as Next Friends of
SYDNEY ROSS and JOHNATHON ROSS, Minor Children;
SYDNEY ROSS, Minor Child;
JOHNATHON ROSS, Minor Child,

Petitioners,

v.

ALLSTATE TEXAS LLOYDS
INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX

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APPENDIX

1 Opinion issued by the United States Court of Appeals, Fifth Circuit (September 21, 2005)

2 Order issued by United States Court of Appeals, Fifth Circuit denying rehearing (July 11, 2006)

3 Amended Final Judgment from the United States District Court for the Southern District of Texas (August 20, 2003)

4 The United States District Court for the Southern District of Texas' Order denying the motion to intervene (September 15, 2003)

United States Court of Appeals
Fifth Circuit
FILED
September 21, 2005

Charles R. Fulbruge III

In the United States Court of Appeals
For the Fifth Circuit

No. 03-20989

DWAYNE ROSS; MARIA ROSS, individually and as next friend of Sydney Ross and Johnathon Ross, minor children; SYDNEY ROSS, minor child; JOHNATHON ROSS, minor child,
Plaintiffs - Appellees,

versus

MATTHEW CURTIS MARSHALL; ET AL,
Defendants,

ALLSTATE TEXAS LLOYDS INSURANCE CO.,
Movant - Appellant.

Appeals from the United States District Court
For the Southern District of Texas

Before HIGGINBOTHAM, DAVIS, and GARZA, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

An insurer sought to intervene as of right in a suit against its insured for the purpose of appealing a judgment holding the insured vicariously liable for $10 million in damages. The district court denied the intervention and struck the insurer's answer and notice of appeal. The insured subsequently abandoned his appeal and assigned all rights and claims against his insurer to the plaintiffs. The insurer appealed. After first addressing our jurisdiction, we conclude that the district court erred in denying intervention and abused its discretion in entering an amended judgment holding the insured vicariously liable for the criminal acts of his child. Accordingly, we reverse the district court's order denying intervention and its amended final judgment, and remand with instructions.

I

On the night of June 18, 2000, Wayne Mathews, then a 20-year old college student, gathered with some of his friends outside his parents' home in Katy, Texas. At approximately 10:30 p.m., Wayne's father Kent Mathews instructed Wayne to "wrap things up," and then retired for the evening to go to sleep. The record indicates that Wayne and his friends were drinking at this time, but is inconclusive as to whether Kent was aware of this fact.

Far from "wrapping things up," Wayne and his friends continued imbibing alcohol, and decided to construct a large wooden cross and burn it in front of an African-American family's home. Using materials gathered in part from the garage of the Mathews' residence, the group set to work on the cross in the driveway and front lawn of the Mathews' home. This activity took place during the early morning hours of June

19. After completing the cross, the group of friends transported it to the home of the Rosses, an African-American family, placed it in their yard and set it ablaze.[1]

The Rosses filed a civil suit against Wayne and his friends, alleging various intentional torts and civil rights violations.[2] In addition, the Rosses sought to recover from Wayne's parents, Kent and Sally Mathews, on grounds that they "knew or should have known that their properties and household effects were being used in [] a negligent and reckless manner." At the time of the cross-burning incident, Kent and Sally Mathews owned a homeowner's insurance policy issued by Allstate covering "damages because of bodily injury . . . caused by an occurrence" for which coverage was provided. Allstate provided an attorney to defend Kent and Sally Mathews subject to a reservation of rights.[3]

The court initially dismissed Kent and Sally Mathews from the suit pursuant to Federal Rule of Civil Procedure 12(b)(6), but reinstated them as defendants when the Rosses clarified that they were seeking to hold them directly liable

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[1] After a federal investigation, the members of the group were apprehended. Wayne pleaded guilty to one count of conspiracy to commit civil rights violations and served time in a federal penitentiary.

[2] Although originally filed in state court, the suit was quickly removed by the U.S. Attorney's office to the federal district court for the Southern District of Texas.

[3] Pursuant to its reservation of rights, Allstate later filed a declaratory judgment action seeking a judicial determination that it had no obligation under the homeowner's policy to defend or indemnify Kent, Sally or Wayne in the present suit. This action remains pending before the same court that tried this case. *See Allstate Tex. Lloyds Ins. Co. v. Mathews*, No. 4:02-CV-0964 (S.D. Tex., filed Mar. 12, 2002).

under a negligence theory, and vicariously liable as principals for their son's intentional acts. The Rosses eventually dismissed their claims against Sally, and went to trial on their claims against Kent, Wayne, and Wayne's friends.

Following trial, a jury found Wayne and his friends liable for approximately $10 million in damages. The jury also found that Kent had delegated his authority to Wayne over the Mathews' property on the night in question, and that this delegation was negligent. However, the jury concluded that this negligent delegation of authority was not a proximate cause of the cross-burning. Based on these findings, the court concluded that

> while it is undisputed that Wayne Mathews' use of the Mathews' property was within the scope of [the delegated] authority, the wrongful acts were not. Therefore, the Court holds that the plaintiff shall take-nothing against Kent Mathews for his wrongful act. Moreover, the wrongful acts and the damages found against Wayne Mathews are not attributable to him.[4]

The Rosses filed a motion to amend the judgment, arguing that they were entitled to recover against Kent on a theory of vicarious liability. Conceding that the jury verdict precluded a finding of direct liability under a negligence theory, the Rosses urged the court to amend its judgment to reflect that they could recover against Kent, as principal, for the acts of his agent, Wayne. They argued that the existence of a principal-agent relationship was supported by the jury's finding that Kent

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[4] *Ross v. Marshall*, No. H-01-1311, at 2 (S.D. Tex. May 28, 2003) (unpublished final judgment).

had delegated authority over the Mathews' house to Wayne on the night of the cross-burning. Further, they contended that Wayne's acts, while not necessarily foreseeable to Kent, were within the scope of authority delegated to Wayne. Kent opposed this motion, arguing that he could not be found liable as a principal because his son's criminal acts fell outside the scope of Wayne's delegated authority.

On August 20, 2003, the district court entered is amended final judgment, finding as a matter of law that Kent was vicariously liable for Wayne's conduct. Despite the jury's finding that Kent's negligent delegation of authority did not cause the Ross's injury, the court found "that it is undisputed that Wayne Mathews' use of the Mathews' property was within the scope of authority granted by Kent Mathews. Therefore, the Court holds that while Kent Mathews is not directly liable, he is, nevertheless, indirectly liable."[5] In its Order on Motion to Amend Judgment, the Court explained that it "erroneously circumscribed and omitted a treatment of Kent Mathews' conduct under a vicarious liability theory" in its original judgment.[6] The court then recounted evidence that Kent was aware of his son's extensive problems with alcohol, noting that a jury could have inferred that Kent knew that Wayne was not a person to whom authority over his personal and real property should be granted. The court continued:

> Based on the jury's findings and the reasonable inferences to be drawn from their findings, the Court concludes that Kent Mathews is, as a

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[5] *Ross v. Marshall*, No. H-01-1311, at 2 (S.D. Tex. Aug. 20, 2003) (unpublished amended final judgment).

[6] *Ross v. Marshall*, No. H-01-1311, at 1-2 (S.D. Tex. Aug. 20, 2003) (unpublished order).

> matter of law, vicariously liable for delegating authority over his premises and materials to an untrustworthy son. The Court also finds and holds that the act of delegation of authority by Kent Mathews was negligent, and [more so] an accident as that term is defined in the policy of insurance.[7]

On September 3, 2003, Kent, through counsel appointed by Allstate, filed a notice of appeal from the amended judgment. On that same day, Allstate filed a post-judgment answer, notice of appeal, and motion to intervene as of right based in part on the district court's coverage finding, and in part on its concern that Kent would not appeal the judgment. Allstate also sought to supersede the judgment by agreeing to a bond in the full amount of its $300,000 policy limit. On September 4, 2003, Kent filed a motion to alter or amend the court's amended judgment. On September 12, 2003, the court struck Allstate's answer and notice of appeal, and denied its motion to intervene and Kent's motion to amend judgment. In addition, the court denied the motion for approval of Allstate's supersedeas bond without opinion. Allstate timely appealed the court's denial of its motion to intervene.

Following these events, Kent agreed to fire his appellate counsel, dismiss his appeal, and assign all his rights against Allstate to the Rosses. In exchange, the Rosses agreed to delay filing writs of execution against his property. We dismissed Kent's appeal for want of prosecution on February 5, 2004.

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[7] *Id.* at 3.

II

Allstate contends that the district court erred in denying its motion to intervene as of right. In addition, Allstate attacks the amended judgment of the district court on several grounds. First, it argues that the district court erred in making findings on an agency theory that had been waived by the Rosses. Second, it contends that the district court erred in entering judgment against Kent as a matter of law based on the agency theory. Third, Allstate urges that the district court abused its discretion by amending its judgment under Rule 59(e) to find Kent liable on a theory that had previously been abandoned. Finally, Allstate argues that the court erred in attempting to hold Kent liable on a negligence theory that was expressly rejected by the jury.

In response, the Rosses contend that this appeal must be dismissed because the district court lacked jurisdiction to rule on Allstate's motion to intervene after Kent filed his notice of appeal. The Rosses also argue that Allstate failed to satisfy the requirements for intervention as of right. Finally, the Rosses argue that they neither waived nor abandoned their agency theory, and that the district court's judgment was supported by both the jury's finding that Kent negligently delegated his authority to Wayne, and undisputed evidence that Wayne's acts were within the scope of that authority.

III

We first address the Rosses's argument that this appeal must be dismissed because the district court lacked jurisdiction to decide Allstate's motion to intervene. Although this

argument was raised for the first time at oral argument, we must consider it as it goes to our jurisdiction.[8]

The substance of the argument is straightforward. The district court entered its amended final judgment holding Kent liable on August 20, 2003. On September 3, Kent filed a notice of appeal, and Allstate filed its motion to intervene. The district court did not deny Allstate's motion to intervene until September 12. Our court follows the general rule that "the filing of a valid notice of appeal from a final order of the district court divests that court of jurisdiction to act on the matters involved in the appeal, except to aid the appeal, correct clerical errors, or enforce its judgment so long as the judgment has not been stayed or superseded."[9] We have found that this rule deprives a district court of jurisdiction to entertain a motion to intervene after a valid notice of appeal has been filed.[10] Thus, under the general rule, the district court lacked jurisdiction to entertain Allstate's motion to intervene.

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[8] *See Hernandez ex rel. Hernandez v. Tex. Dep't. of Protective & Regulatory Servs.*, 380 F.3d 872, 878 (5th Cir. 2004) ("Prior to reaching the merits, we must verify, *sua sponte*, that our jurisdiction . . . is proper."); *In re McCloy*, 296 F.3d 370, 373 (5th Cir. 2002) ("[A] lack of subject matter jurisdiction may be raised at any time, and we can examine the lack of subject matter jurisdiction for the first time on appeal.").

[9] *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 928 (5th Cir. 1983).

[10] *See Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir. 1984) (district court lacked jurisdiction to entertain motion to intervene filed seven days before notice of appeal, but not ruled on until after appeal was taken); *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 927-28 (district court lacked jurisdiction to entertain motion to intervene filed more than one month after a timely notice of appeal).

Responsive to our request for supplemental briefing, Allstate urges that the notice of appeal filed on September 3 was rendered ineffective by the filing of Kent Mathews' Rule 59(e) motion to amend judgment filed on September 4, and revived only when the district court entered its ruling denying the Rule 59(e) motion on September 15. As a result, Allstate concludes that the district court had jurisdiction to deny Allstate's motion to intervene on September 12.

Federal Rule of Appellate Procedure 4(a)(4)(B)(i) provides:

> If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.[11]

Our court has found that the timely filing of a motion listed in Rule 4(a)(4)(A) suspends or renders dormant a notice of appeal until all such motions are disposed of by the trial court.[12] This

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[11] FED. R. APP. P. 4(a)(4)(B)(i).

[12] *See Simmons v. Reliance Standard Life Ins. Co. of Tex.*, 310 F.3d 865, 868 (5th Cir. 2002) ("Rule 4(a)(4) suspends the time for review by this Court because, until the district court addresses all post-judgment motions specified by the rule, it has not entirely finished with a case."); *Bann v. Ingram Micro, Inc.*, 108 F.3d 625, 626 (5th Cir. 1997) ("Bann's notice of appeal, filed after the entry of the judgment but before the disposition of his motion to reinstate the case, was ineffective to appeal from the judgment until the entry of the order disposing of that motion."); *Burt v. Ware*, 14 F.3d 256, 258 (5th Cir. 1994) (treating a notice of appeal filed before disposition of a post-judgment motion listed in Rule 4(a)(4)(A) as

holds true regardless of whether the motion was filed before or after the notice of appeal.[13]

One of the motions listed in Rule 4(a)(4)(A) is a motion "to alter or amend the judgment under Rule 59."[14] Because Kent Mathews' timely filed his Rule 59 motion to alter of amend judgment, his motion suspended the effectiveness of his earlier filed notice of appeal until September 15, the date on which the district court entered is order denying the motion.[15]

"dormant").

[13] An Advisory Committee note to Paragraph (a)(4) provides: "A notice filed *before the filing of one of the specified motions* or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion if disposed of, whereupon, the previously filed notice *effectively places jurisdiction in the court of appeals*." FED. R. APP. P. 4 Advisory Committee note (1993 Amendments) (emphasis added). Although "Advisory Committee Notes do not have the force of law, [] they are instructive in determining Congress's intent in amending a statute." *Moody Nat'l Bank of Galveston v. GE Life & Annuity Assurance Co.*, 383 F.3d 249, 253 (5th Cir. 2004).

In *United States v. Silvers*, the Fourth Circuit applied the 1993 amendments to Rule 4, finding:

> Under the 1993 amendments to the Federal Rules of Appellate Procedure, when a party files a timely notice of appeal followed by a timely Rule 59 motion, the notice of appeal is tolled and does not become effective to confer jurisdiction on the court of appeals until the entry of an order disposing of the Rule 59 motion.

90 F.3d 95, 98 (4th Cir. 1996).

[14] FED. R. APP. P. 4(a)(4)(A)(iv).

[15] *See* FED. R. APP. P. 4(a)(4)(B)(i) (notice of appeal becomes effective "when the order disposing of the last such remaining motion is *entered*" (emphasis added)); *cf. Burt*, 14 F.3d at 258 ("Under amended Rule 3(d), the district court is required to send a copy of any later docket entry in [plaintiff's] case to the court of appeals. Those docket entries will serve to

Thus, the district court had jurisdiction to deny Allstate's motion to intervene on September 12.

The Rosses contend that this conclusion is inaccurate, and cite to *Katz v. Berisford International, PLC*[16] for the proposition that Rule 4(a)(4) only applies to extend the appellate deadline for "parties." In *Katz*, two creditors sought to intervene for the purpose of moving to amend a final judgment pursuant to Rule 59(e) or 60(b). They filed their motion to intervene, along with a motion to alter or amend judgment, on September 11, 2000. Before the district court ruled on their motion to intervene, the defendant filed a timely notice of appeal.

The district court found that because "the filing of a notice of appeal divests [a] district court of jurisdiction and transfers it to the Court of Appeals . . . this court does not have jurisdiction to decide this motion to intervene."[17] The court then rejected the intervenors' contention that their motion to alter or amend tolled the effectiveness of the notice of appeal. In so holding, the court found that Rule 4(a)(4)(B)(i) specifically provides that a notice of appeal will be tolled only if a "party" files a motion to alter or amend. The court then observed that Rule 4(a)(4)(B)(i) "does not apply to [the motion to intervene] because the Intervenors are not yet 'parties' to the case."[18] The court concluded: "For the Intervenors to file a

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advise this court of the date on which [plaintiff's] notice of appeal becomes effective.").

[16] No. 96-CIV-8695, 2000 WL 1760965 (S.D.N.Y. Nov. 30, 2000).

[17] *Id.* at *2 (citing *Nicol*, 743 F.2d at 299).

[18] *Id.*

Rule 59 motion, this Court would have to grant their Rule 24(a) motion, which it cannot do because it does not have jurisdiction to decide that motion."[19]

Unlike the Rule 59(e) motion in *Katz*, which was filed by *non-parties* who were seeking to intervene, the Rule 59(e) motion in this case was filed by a *party*, Kent Mathews. Consequently, we find that *Katz* is inapplicable here, and conclude that the district court properly had jurisdiction to deny Allstate's motion to intervene.[20]

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[19] *Id.*

[20] In the alternative, Allstate urges that the district court retained jurisdiction to rule on its motion to intervene because such action would "aid the appeal." This argument finds support in Professors Wright, Miller and Cooper's treatise on federal practice:

> There is a split of opinion on the question whether the district court loses jurisdiction to grant intervention to appeal after a notice of appeal has been filed. Although a notice of appeal ousts district court jurisdiction for most purposes, it would be better to recognize that the district court can act. The district court need not be given a preliminary education about the case to support an intelligent ruling, and its action is in support of the appeal process, not in derogation of it.

15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3902.1 (2d. ed. 1992) (citations omitted). Although not without force, we need not reach this argument here as the district court retained jurisdiction following the filing of Kent Mathews' Rule 59 motion to alter or amend judgment.

IV

We turn to the contention that the district court erred in denying Allstate's motion to intervene as of right. We review denials of intervention of right *de novo*.[21]

In the absence of a federal statute conferring an unconditional right to intervene, a motion to intervene as of right is governed by Federal Rule of Civil Procedure 24(a)(2). A motion to intervene under Rule 24(a)(2) is proper when:

> (1) the motion to intervene is timely; (2) the potential intervener (sic) asserts an interest that is related to the property or transaction that forms the basis of the controversy in the case into which she seeks to intervene; (3) the disposition of that case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest.[22]

Although failure to satisfy any one element precludes the applicant's right to intervene, we have noted that "the inquiry under subsection (a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application," and concluded that "intervention of right must be

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[21] *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 822 (5th Cir. 2003).

[22] *Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir. 2004).

measured by a practical rather than technical yardstick."[23] Intervention should generally be allowed where "no one would be hurt and greater justice could be attained."[24]

A

Our first task is to determine whether Allstate's motion to intervene was timely. While we normally review a district court's finding of timeliness for an abuse of discretion, we review the timeliness element *de novo* where, as here, the district court fails to articulate reasons for its timeliness determination.[25]

In *Stallworth v. Monsanto* Co.,[26] we set forth four factors that must be considered when evaluating whether a motion to intervene was timely:

> Factor 1. The length of time during which the would-be intervenor actually or reasonably should have known of his interest in the case before he petitioned for leave to intervene.
>
> *****
>
> Factor 2. The extent of prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to

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[23] *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (internal quotation marks and citations omitted).

[24] *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (internal quotation marks and citation omitted).

[25] *See John Doe No. 1 v. Glickman*, 256 F.3d 371, 376 (5th Cir. 2001); *Edwards*, 78 F.3d at 1000.

[26] 558 F.2d 257 (5th Cir. 1977).

> apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.
>
> *****
>
> Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.
>
> *****
>
> Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.[27]

Although these factors give structure to our timeliness analysis, we have explicitly observed that the timeliness analysis remains "contextual," and should not be used as a "tool of retribution to punish the tardy would-be intervenor, but rather [should serve as] a guard against prejudicing the original parties by the failure to apply sooner."[28] With this caveat in mind, we examine each of the *Stallworth* factors in turn.

1

The first *Stallworth* factor "focuses on the time lapse between the applicant's receipt of actual or constructive knowledge of his interest in the litigation and the filing of his motion for intervention."[29] The Rosses contend that this factor cuts against Allstate because it was aware of its interest in the present suit at the latest on March 12, 2002, when it filed its declaratory judgment action, yet waited until September 3,

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[27] *Id.* at 264-66 (italics omitted).

[28] *Sierra Club*, 18 F.3d at 1205.

[29] *Edwards*, 78 F.3d at 1000.

2003, to file its motion to intervene. In addition, the Rosses argue that Allstate's motion is untimely *ex lege* because it was filed after the district court entered its final judgment. Allstate contends that its motion to intervene was timely as it was filed as soon as practicable after its insured was held liable and within the time for filing an appeal from the judgment.

While it is true that motions for intervention filed after judgment is entered are frequently denied as untimely,[30] we have found that there are no "absolute measures of timeliness,"[31] and have allowed post-judgment intervention of right in some cases.[32] Indeed, in *Stallworth* we observed that "whether the request for intervention came before or after the entry of judgment [is] of limited significance," noting that intervention could be allowed post-judgment provided that the rights of existing parties were not prejudiced and intervention did not interfere with the orderly processes of the court.[33]

A common example of post-judgment intervention that satisfies these criteria is intervention for the purpose of

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[30] *See id.* at 1001 (collecting cases).

[31] *Sierra Club*, 18 F.3d at 1205.

[32] *See, e.g., Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203-04 (5th Cir. 1992); *Baker v. Wade*, 769 F.2d 289, 291 (5th Cir. 1985) (en banc), *rev'd on other grounds by Lawrence v. Texas*, 539 U.S. 558 (2003).

[33] 558 F.2d at 266; *see also McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1072 (5th Cir. 1970) (noting that while it is true that post-judgment intervention is normally looked upon with a "jaundiced eye," the "rationale which seems to underlie this general principle . . . is the assumption that allowing intervention after judgment will (1) prejudice the rights of the existing parties to the litigation or (2) substantially interfere with the orderly processes of the court.").

appealing a decision that the existing parties to a suit have decided not to pursue.[34] In *United Airlines v. McDonald*,[35] the Supreme Court found that a flight attendant's post-judgment motion to intervene for the purpose of appealing the district court's denial of class certification was timely when she filed her motion "as soon as it became clear . . . that [her] interests . . . would no longer be protected by the named class representatives."[36] The district court had denied class certification, and after securing a judgment for damages nearly three years later, the named class representatives opted not to appeal the district court's class certification ruling. The Court observed that its decision to allow the flight attendant to intervene post-judgment was consistent with the decisions of several federal courts, finding that in each case the "critical inquiry . . . is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment."[37] Specifically, the Court found that the flight attendant had "filed her motion within the time period in which the named plaintiffs could have taken an appeal."[38]

In this case, Allstate sought to intervene for the purpose of appealing an adverse judgment against its insured that it rightly believed would not be appealed by the existing parties.

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[34] *See* 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 24.24[3] (3d. ed. 1998).

[35] 432 U.S. 385 (1977).

[36] *Id.* at 395.

[37] *Id.* at 395-96.

[38] *Id.* at 396; *see also* MOORE, *supra* note 34, ¶ 24.24[3] ("The general rule is that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal.").

Allstate filed its motion promptly after the district court entered its amended final judgment, and within the time in which a named party could have taken an appeal. Because Allstate sought to intervene solely for the purpose of taking an appeal, granting its motion would not have affected the orderly processes of the court. Further, we note that although Allstate was aware that its interests were at stake long before it sought to intervene, intervention prior to judgment would have been pointless as Allstate's interests were being adequately represented by counsel for Kent Mathews--counsel that was being provided by Allstate.[39] Given these circumstances, we find that Allstate's motion to intervene was not impermissibly tardy.

2

The second *Stallworth* factor requires that we determine the extent to which the Rosses will be prejudiced by Allstate's failure to seek intervention at an earlier time. "This factor is concerned only with the prejudice caused by the applicants' delay, not that prejudice which may result if intervention is allowed."[40]

The Rosses claim that if Allstate is allowed to intervene, they will suffer a "mountain of prejudice" in the form of wasted resources and delay caused by frivolous

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[39] In *Sierra Club v. Espy*, we noted that "[c]ourts should discourage premature intervention that wastes judicial resources. A better gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties." 18 F.3d at 1206 (internal citation omitted).

[40] *Edwards*, 78 F.3d at 1002 (citing *Stallworth*, 558 F.2d at 265); *accord Ceres Gulf*, 957 F.2d at 1203; *Sierra Club*, 18 F.3d at 1206.

motions and "this frivolous appeal." These inconveniences, while not insubstantial, are all the result of Allstate's decision to appeal both the district court's denial of its motion to intervene and the amended judgment. In order to show prejudice, the Rosses must point to results that would not have obtained but-for Allstate's failure to file its motion to intervene *earlier*.[41] The inconveniences cited by the Rosses are those commonly associated with defending a ruling or judgment on appeal, and would have arisen regardless of whether Allstate sought to intervene before the district court entered its amended judgment. Accordingly, we find that Rosses will suffer no prejudice as a result of Allstate's failure to seek intervention at an earlier time.

3

The third *Stallworth* factor "focuses on the prejudice the potential intervenor would suffer if not allowed to intervene."[42] The Rosses argue that Allstate will suffer no prejudice if not allowed to intervene because it has no interest at stake in the present suit. Specifically, the Rosses contend that Allstate's interest in contesting coverage under the policy cannot be impaired by the dictum in the district court's order referencing coverage because such dictum is non-binding. The Rosses also argue that Allstate's interest in defending its insured will not be impaired because it abandoned Kent Mathews by failing to post a supersedeas bond in the full amount of the judgment. Finally

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[41] *See John Doe No. 1*, 256 F.3d at 378; *Stallworth*, 558 F.2d at 265 ("[T]o take any prejudice that the existing parties may incur if intervention is allowed into account under the rubric of timeliness would be to rewrite Rule 24 by creating an additional prerequisite to intervention as of right.").

[42] *John Doe No. 1*, 256 F.3d at 378-79.

the Rosses note that Allstate's attempted bond is not at risk because it was rejected by the district court.

These contentions ignore the prejudice that Allstate will suffer if it is not allowed to contest a judgment against its insured that may expose it to significant liability both in a subsequent coverage suit and in a suit for extra-contractual damages. Allstate's interest in protecting itself from liability by minimizing the liability of its insured is strong, particularly in light of the fact that Allstate provided Mathews with a defense in this case subject to a reservation of rights and is bound by the district court's judgment.[43] Allstate will suffer considerable prejudice if it is denied the opportunity to challenge this judgment on appeal.

4

Under the fourth *Stallworth* factor, we must ascertain whether any unusual factors weigh in favor of a finding of timeliness. We find that the Kent Mathews' decision to abandon his appeal and fire his appellate counsel at the behest of the Rosses, and the Rosses' subsequent attempt to deny Allstate the opportunity to seek appellate review of the district court's amended judgment constitutes an unusual circumstance favoring a finding of timeliness in this case.

5

In sum, we find based upon our analysis of the *Stallworth* factors as applied to the facts of this case that Allstate's motion to intervene was timely.

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[43] *See infra* Part IV.B.

B

The second element that an applicant must satisfy in order to intervene as of right is the assertion of an interest related to the property or transaction at issue in the case. We have held that in order to meet this requirement, an applicant must point to an interest that is "direct, substantial, [and] legally protectable."[44] This requires a showing of something more than a mere economic interest; rather, the interest must be "one which the *substantive law* recognizes as belonging to or being owned by the applicant."[45] In addition, "the intervenor should be the real party in interest regarding his claim."[46] Despite these requirements, we have observed that "the interest 'test' is primarily a practical guide to disposing of lawsuits by

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[44] *See New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc) (internal quotation marks and citation omitted).

[45] *Id.* at 464.

[46] *Saldano*, 363 F.3d at 551. We articulated the "real party in interest" requirement in *New Orleans Public Service, Inc.*, 732 F.2d at 464, in which we observed that the real party in interest requirement of FED. R. CIV. PROC. 17(a) applies to potential intervenors as well as parties. Our application of this rule here is complicated by the fact that "Rule 17(a) applies only to those who are asserting a claim and thus is of most importance with regard to *plaintiffs*." 6A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1543 (1990) (emphasis added). With respect to a potential intervenor seeking to *defend* an interest being attacked by a plaintiff in a lawsuit, we have observed that the intervenor is a real party in interest when the suit was intended to have a "direct impact" on the intervenor. *See Sierra Club v. Glickman*, 82 F.3d 106, 109 (5th Cir. 1996) [hereinafter *Glickman*]. Given the terms of the Rosses' agreement with Kent Mathews, it is beyond peradventure that the present litigation is designed to have a direct impact on Allstate.

involving as many apparently concerned persons as is compatible with efficiency and due process."[47]

Allstate argues that it must be allowed to intervene in order to appeal a substantial judgment against its insured; that it is a real party in interest up to the $300,000 limit of Kent Mathews' insurance policy. Although a close call, we are persuaded that this interest is sufficient to meet the second requirement of intervention under Rule 24(a)(2). Without question, an insurer has a financial stake in securing a favorable outcome for its insured in a lawsuit alleging potentially covered claims. This financial interest is particularly strong when, as here, the insurer has been given an opportunity to defend the suit, and therefore is in privity with the insured as to the ensuing judgment.[48] For this reason, insurers frequently have a contractual right and duty to defend their insureds against a suit alleging a covered claim.

Recognizing this, the Texas Supreme Court has found that a liability insurance policy "may grant the insurer the right to take 'complete and exclusive control' of the insured's defense."[49] However, when an insurer offers to defend pursuant to a reservation of rights, thereby preserving its ability

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[47] *Espy*, 18 F.3d at 1207 (some internal quotation marks omitted) (quoting *Ceres Gulf*, 957 F.2d at 1203 n.10).

[48] *See Ridgway v. Gulf Life Ins. Co.*, 578 F.2d 1026, 1029 (5th Cir. 1978) (finding that a liability insurer with a right to defend and adequate notice of a claim, while "not necessarily a formal party to the suit," is not "a stranger to the judgment," and concluding that the "contractual relation of liability and social policy supply the necessary privity of party between insured and insurer to bind the latter").

[49] *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998).

to raise coverage defenses, the insured may properly refuse the tender of defense and "choose to defend the suit personally."[50] An insurer that reserves its rights does not surrender its interest in minimizing the liability of its insured. Accordingly, the insurer may still assume the defense of its insured if the insured so permits. Further, an insured who rejects an insurer's offer of a qualified defense must either reach a reasonable settlement or provide a reasonable defense in order for its insurer to be bound by any ensuing judgment.[51]

A more difficult question is whether the insurer's interest in minimizing its insured's liability is sufficiently *direct* to permit intervention as of right when the insurer defends under a reservation of rights. Two of our sister circuits have answered this query in the negative. In *Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc.*,[52] the Second Circuit examined whether an insurer had the right to intervene in an ongoing lawsuit filed against its insured. The insurer was defending under a reservation of rights, and sought

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[50] *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 445 (5th Cir. 1991); *see also Housing Auth. of Dallas v. Northland Ins. Co.*, 333 F. Supp. 2d 595, 600 (N.D. Tex. 2004); *Am. Eagle Ins. Co. v. Nettleton*, 932 S.W.2d 169, 174 (Tex. App.--El Paso 1996, writ denied).

[51] *See U.S. Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 955 (5th Cir. 1990) (holding that, under Texas law, an insurer that offers to defend under a reservation of rights is not bound by an *unreasonable* settlement reduced to a consent judgment); *Britt v. Cambridge Mut. Fire Ins. Co.*, 717 S.W.2d 476, 482 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.) (holding that doctrine of collateral estoppel may not be raised by insured to bind insurer to a judgment of liability against the insured when the insured failed to conduct a reasonable defense and colluded with the plaintiff to defraud the insurer).

[52] 725 F.2d 871 (2d Cir. 1984).

to intervene for the purpose of submitting interrogatories instructing the jury to specify the basis for any damages it awarded.[53] The court identified the "critical inquiry" as whether the insurer possessed a sufficient interest in the suit against its insured. Noting that an interest sufficient to justify intervention under Rule 24(a) "must be direct, as opposed to remote or contingent," the court found that an insurer defending under a reservation of rights has no direct interest in a suit against its insured for which it may ultimately be liable.[54] The court explained that the insurer's interest in reducing or even eliminating its own liability, while implicated by the suit, was too remote because it was dependent upon two contingencies: a jury verdict finding the insured liable for damages; and an adverse coverage determination in a future lawsuit.[55]

In *Travelers Indemnity Co. v. Dingwell*,[56] the First Circuit affirmed the denial of a motion to intervene as of right filed by a group of insurers seeking to oppose entry of a consent judgment against their insured when the insurers had reserved the right to deny coverage. Addressing the insurers' interest in minimizing the liability of their insured, the court conceded that "[t]here can be no dispute that an insurer has a direct interest in a lawsuit brought by an injured party against its insured when

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[53] In support of its motion to intervene, the insurer argued that "it was critical to 'know with certainty the exact dollar amount of the damages assessed against [the insured] for which [the insured] claims to be entitled to indemnification from [the insurer],' in the event that the jury found for [the plaintiff]." *Id.* at 873.

[54] *Id.* at 874-75 (citing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 154 (1967) (Stewart, J., dissenting)).

[55] *Id.* at 875.

[56] 884 F.2d 629 (1st Cir. 1989).

the insurer admits that the claim is covered by the policy in question."[57] The court observed, however, that "[w]hen the insurer offers to defend the insured but reserves the right to deny coverage . . . the insurer's interest in the liability phase of the proceeding is contingent on the resolution of the coverage issue."[58] The court rejected the notion that this position was "overly 'legalistic' or 'mechanical,'" noting that it reflected the "well-established policy that an insurer who reserves the right to deny coverage cannot control the defense of a lawsuit brought against its insured by an injured party."[59] Elaborating on this proposition, the court observed that "[a]llowing the insurer to intervene to protect its contingent interest would allow it to interfere with and in effect control the defense. Such intervention would unfairly restrict the insured, who faces the very real risk of an uninsured liability, and grant the insurer 'a double bite at escaping liability.'"[60]

We find both *Restor-A-Dent* and *Travelers* to be distinguishable from the facts of the present case in two significant ways. First, unlike the insurers in *Restor-A-Dent* and *Travelers* which sought to intervene *before* a judgment was entered holding their insureds liable, Allstate seeks to intervene for the purpose of appealing an *existing* judgment holding its insured liable for $10 million. Importantly, by seeking to

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[57] *Id.* at 638.

[58] *Id.* (citing *Restor-A-Dent Dental Laboratories, Inc.*, 725 F.2d at 874-76).

[59] *Id.* at 638-39 (quoting *Guar. Nat'l Ins. Co. V. Pittman*, 501 So. 2d 377, 384 (Miss. 1987)).

[60] *Id.* (citation omitted); *accord Nieto v. Kapoor*, 61 F. Supp. 2d 1177, 1192-93 (D.N.M. 1999); *Chrysler Corp. v. Haden Uniking Corp.*, 158 F.R.D. 405, 407-08 (N.D. Ill. 1994).

intervene solely to appeal the judgment, Allstate is not attempting to "interfere" with the defense of its insured. There is no danger that Allstate will attempt to steer the jury towards a verdict holding its insured liable on non-covered grounds, or interject interrogatories harmful to its insured's interests. Rather, Allstate's interest in minimizing its potential liability exposure is aligned with Mathews' interest in avoiding a $10 million judgment.

Second, although some contingency remains in that Allstate may still avoid liability if it prevails in its coverage action, we find this contingency insufficient to preclude intervention. In both *Restor-A-Dent* and *Travelers*, the insurers sought to intervene when two contingencies separated them from possible liability: a judgment against their insureds, *and* an adverse judgment in a subsequent coverage suit. Here, Allstate is already bound by the present judgment, and may not re-litigate Mathews' liability in a subsequent lawsuit. All that remains in order for Allstate to be fully liable for the judgment up to its policy limits is a finding of coverage or liability in a suit on extra-contractual damages.[61] Further, although there is a dearth of authority on the question of whether an insurer that reserves its rights has a sufficiently direct interest to intervene as of right in a suit against its insured for the purpose of appealing the judgment, a handful of courts have held that insurers may intervene to contest various aspects of judgments

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[61] In its order addressing the Rosses' motion to amend the judgment, the district court found that Mathews was vicariously liable for the acts of his son, and that "the act of delegation of authority by Kent Mathews was negligent, as found by the jury, and moreso an accident as that term is defined in the policy of insurance." *Ross*, No. H-01-1311, at 3 (unpublished order). Although dictum, this statement is significant because Allstate's declaratory judgment suit regarding coverage is pending before the same district court that authored the order.

entered against their insureds following a reservation of rights.[62] These cases point up the absence of a monolithic opposition to insurers intervening in cases brought against their insureds, and are consistent with the toleration shown in our case law for some degree of contingency in the interests of persons seeking intervention as of right.[63]

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[62] See *Bridge v. Air Quality Technical Servs., Inc.*, 194 F.R.D. 3, 7 (D. Me. 1999) (holding that an insurer had a sufficiently direct interest to intervene under Rule 24(a) at the damages phase of a trial following entry of default judgment against its insured); *Campbell v. Plank*, 133 F.R.D. 175, 176 (D. Kan. 1990) (holding that an insurer had an interest sufficient to support intervention under Rule 24(a) when both the plaintiff and the defendant in the underlying action were insured by the insurer, and the parties entered into a collusive agreement whereby the defendant agreed not to oppose entry of judgment against him in exchange for the plaintiff's agreement to limit his recovery to insurance proceeds and amounts received as damages for any extra-contractual claims); *see also Davila v. Arlasky*, 141 F.R.D. 68, 72-73 (N.D. Ill. 1991) (noting that the word "contingent" in cases such as *Restor-A-Dent* and *Travelers* "is often used as a proxy for evaluating the importance of the interest and the likelihood that it could be impaired," and concluding that "a close examination of the facts is more helpful to determine whether there is a sufficient interest for 24(a) intervention than categorizing is").

[63] See *Glickman*, 82 F.3d at 109-10 (holding that the interest of farmers in drawing water from an aquifer was sufficient to justify intervention as of right by Farm Bureau in a suit brought by the Sierra Club against the USDA seeking to enjoin the expenditure of "any funds to the farmers that directly or *indirectly* support pumping from the [a]quifer" (emphasis added)); *Edwards*, 78 F.3d at 1004 (holding that interest of police officers in having equal access to a promotion system was sufficient to justify intervention as of right by officers' associations and unions to contest entry of a consent decree in an employment discrimination case against the City of Houston requiring a series of remedial promotions for members of certain minority groups); *see also Ceres Gulf*, 957 F.2d at 1203 (noting that Rule 24(a)(2) "property or transaction" need not be defined in an unduly narrow fashion).

Finally, we note that the Rosses have made Allstate the central focus of their collection efforts by agreeing to delay executing on Kent Mathews' property in exchange for a full assignment of his rights against Allstate. We also recognize that this assignment transferred not only Mathews' right to collect from Allstate under his insurance contract, but also any claim he may have relating to Allstate's refusal to settle within policy limits. Thus, Allstate has a second interest at stake in the underlying litigation: minimizing its potential exposure in a bad faith settlement practices claim. While this interest is also contingent upon an adverse finding in a separate suit, Allstate may minimize or eliminate this exposure by contesting the judgment against Mathews on appeal.

In sum, we conclude that Allstate has a sufficient interest in the present suit to merit intervention as of right for the purpose of appealing the judgment against its insured.

C

The third criterion that an applicant for intervention must satisfy is that the disposition of the case into which he seeks to intervene "may, as a practical matter, impair or impede his ability to protect [that] interest."[64] The Rosses argue that a judgment against Mathews in no way impairs or impedes Allstate's ability to protect its interest in minimizing its liability because Allstate may still avoid liability entirely by prevailing in its coverage suit. This argument conflates Allstate's interest in avoiding coverage with its interest in minimizing or eliminating the liability of its insured.

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[64] *Sierra Club*, 18 F.3d at 1207; *see John Doe No. 1*, 256 F.3d at 380.

An insurer may avoid liability for a claim made against its insured in one of two ways: the insurer may either defeat the claim on its merits, or establish that coverage is not available for the claim.[65] By effectively settling with the Rosses following entry of judgment against him, Mathews eliminated any possibility that Allstate could avoid liability by challenging the judgment against its insured on appeal. This result leaves Allstate with potential liability exposure in its coverage suit up to $300,000, and with potential liability exposure for additional amounts in a bad faith suit--all without being afforded the opportunity to appeal a judgment in a suit which it defended. These large stakes make clear that the disposition of the underlying suit has, at the very least, the potential to impair Allstate's interest.

D

The final criterion that a potential intervenor must satisfy in order to intervene as of right is that "the existing parties do not adequately represent" his interest.[66] We have described this burden as "minimal," noting that a potential intervenor need only show that "representation by the existing

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[65] *See Ideal Mut. Ins. Co. v. Myers*, 789 F.2d 1196, 1205-06 (5th Cir. 1996) (Higginbotham, J., concurring in part and dissenting in part) (noting that, prior to the execution of a settlement agreement between the plaintiff and the insured, the insurer could have avoided liability both by establishing non-coverage *and* by showing that its insured was not liable); *see also* Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 269 (1994) ("Because of its financial interest in the effective resolution of a claim, the insurer has a contractual right to control its insured's defense.").

[66] *John Doe No. 1*, 256 F.3d at 380 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Espy*, 18 F.3d at 1207).

parties *may* be inadequate."[67] We find that Allstate has met this burden by demonstrating that Mathews both fired counsel provided to him by Allstate and abandoned his appeal of the district court's judgment. Although these events occurred after the district court denied Allstate's motion to intervene, the motion was premised in part on Allstate's well-founded belief that Mathews had ceased to cooperate and would not pursue an appeal. This is sufficient to meet Allstate's minimal burden of showing inadequate representation.

E

In sum, we hold that the district court erred in denying Allstate's motion to intervene as of right. Accordingly, we now turn to the merits of Allstate's appeal.[68]

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[67] *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 425 (5th Cir. 2002); *but see Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984) ("However 'minimal' this burden [of showing inadequate representation] may be, it cannot be treated as so minimal as to write the requirement completely out of the rule.").

[68] The Rosses claim that the only issue properly before us is intervention, and that Allstate cannot appeal the judgment because it is not a party to it. We are cognizant of the "well-settled" rule that "one who is not a party to a lawsuit, or has not properly become a party, has no right to appeal a judgment entered in that suit." *Edwards*, 78 F.3d at 993. In this case, however, remand to the district court would be futile given that Allstate's motion to intervene was for the sole purpose of taking an appeal. As the issues have been fully briefed and argued, we will proceed to the merits. *See Ceres Gulf*, 957 F.2d at 1204-05 (reversing district court's denial of intervention as of right and reaching the merits of the intervenor's claim on appeal).

V

As we have already noted, Allstate challenges the amended final judgment on a number of grounds.[69] We will limit our analysis to Allstate's claim that the district court was incorrect in its assessment that Mathews should be held vicariously liable for the criminal acts of his son.

In their pleadings and at trial, the Rosses sought to hold Kent Mathews liable on both negligence and agency theories. At the charge conference, the district court proposed special interrogatories inquiring (1) whether Mathews delegated authority over his property to his son on the night of the cross-burning; (2) whether this delegation constituted negligence; and (3) whether this negligence was a proximate cause of the Rosses' damages. The Rosses objected and requested a definition of "authority" as used in the context of a principal-agent relationship. Mathews' attorney objected on grounds that an agency question must be accompanied by instructions regarding the elements of agency as well as a question asking whether the agent's actions came within the scope of authority granted. The court responded:

> The question is whether or not--The threshold entry question is whether or not there was negligence in granting authority with whatever knowledge Kent Mathews had, granting any authority to his son to do anything as it relates to handling the property. That's a threshold question.

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[69] *See supra* Part II.

> It doesn't require a finding that there was some use of that property that was improper, because the only question that's being asked--And it doesn't require any agency relationship. I don't have to establish an agency relationship to be negligent in handing something or passing something off to someone.
>
> That's my view of negligence. Negligence is a duty, a breach of duty and damages. What is the negligence? The authority given to his son should or should not have been given to him. That's the question that's being raised, the negligent act. The authority given to him either should or should not have been given to him.
>
> If it should not have been given to him, was there a duty not to and was there a breach of that duty? That's what I'm raising here in this particular interrogatory. It doesn't go to this agency relationship or theory.

The jury answered questions 1 and 2 in the affirmative, but returned a negative answer to question 3. Alleging that the jury's affirmative answer to question 1 established a basis for finding that Mathews delegated actual authority over his house to his son on the night of the cross-burning, the Rosses moved the court to enter judgment holding Mathews liable under a vicarious liability theory. The court entered judgment on the verdict for Mathews, holding that he was not liable under either a negligence or agency theory because his "negligence was not a proximate cause of the harm inflicted on the plaintiffs," and

his son's wrongful acts were not within the scope of delegated authority.[70]

The Rosses subsequently filed a Rule 59(e) motion requesting that the court alter its judgment to hold Mathews liable under an agency theory. The court granted this motion, and entered an amended final judgment in which it held that "it is undisputed that Wayne Mathews' use of the Mathews' property was within the scope of authority given by Kent Mathews'."[71] In its order on the Rosses' motion to amend, the court observed that its prior judgment had "erroneously circumscribed and omitted a treatment of Kent Mathews' conduct under a vicarious liability theory."[72] The court then detailed evidence that Wayne Mathews regularly consumed alcohol, had been arrested for consuming alcohol while in high school and received counseling, and "had many problems

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[70] *Ross*, No. H-01-1311, at 2 (unpublished final judgment). Because a question regarding scope of authority was not submitted to the jury and no objection was lodged, the court's finding on this question was made pursuant to Rule 49(a) which provides: "As to an issue omitted [from the jury instructions] without . . . demand the court may make a finding." FED. R. CIV. P. 49(a). We recognize, based on the colloquy between the attorneys and the court at the charge conference, that the interrogatories submitted to the jury contained no questions relating to the Rosses' agency theory, raising the question of whether this theory was completely waived. *Compare Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 281 (5th Cir. 1998) (failure to object to the omission of a claim from the jury instructions results in waiver), *with MBank Fort Worth, N.A. v. Trans Meridian, Inc.*, 820 F.2d 716, 722-24 (5th Cir. 1987) (finding that a court considered and rejected a theory omitted from the jury instructions pursuant to Rule 49(a)). We need not pause before this tiger in the reeds beside our path, however, given that we can resolve this case on different grounds.

[71] *Ross*, No. H-01-1311, at 2 (unpublished amended final judgment).

[72] *Ross*, No. H-01-1311, at 1-2 (unpublished order).

associated with alcohol that were ignored by Kent Mathews."[73] "Hence," the court observed, "the jury could have inferred that Kent Mathews knew that his son was not a person to whom he should grant authority or control over his property."[74] The court then concluded that "Kent Mathews is, as a matter of law, vicariously liable for delegating authority over his premises and materials to an untrustworthy son."[75]

We will "generally review a decision on a motion to alter or amend judgment under Rule 59(e) for abuse of discretion."[76] However, "[t]o the extent that a ruling was a reconsideration of a question of law . . . the standard of review is *de novo*."[77] A motion to alter or amend judgment must "clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued. Moreover, they cannot be used to argue a case under a new legal theory."[78] A district court abuses its discretion if it "bases its decision on an

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[73] *Id.* at 3.

[74] *Id.*

[75] *Id.*

[76] *Pioneer Natural Res. USA, Inc. v. Paper, Allied Indus. & Energy Workers Int'l Union Local*, 328 F.3d 818, 820 (5th Cir. 2003).

[77] *Id.*

[78] *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (internal quotation marks and citation omitted).

erroneous view of the law or on a clearly erroneous assessment of the evidence."[79]

Under Texas law, a principal "is vicariously liable for the torts of [his agents] committed in the course and scope of their employment."[80] "To find that the employee acted within the scope of employment, the action of the employee must be: (1) within the general authority given him; (2) in furtherance of the employer's business; and (3) for the accomplishment of the object for which the employee was employed."[81] Moreover,

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[79] *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 638 (5th Cir. 2005) (internal quotation marks and citation omitted); *see Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005) ("Because a court, by definition, abuses its discretion when it makes an error of law, an appellate court may correct such mistakes.").

[80] *GTE S.W., Inc. v. Bruce*, 998 S.W.2d 605, 617 (Tex. 1999); *see Medina v. Herrera*, 927 S.W.2d 597, 601 (Tex. 1996) ("Generally, a master is vicariously liable for the torts of its servants committed in the course and scope of their employment."); RESTATEMENT 2D AGENCY § 219(2)(b) (1958) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless: . . . the master was negligent or reckless."). Under § 219 of the Restatement, "[l]iability exists only if *all the* requirements of an action of tort for negligence exists." *Id.* at § 213 cmt. a (emphasis added).

[81] *Williams v. United States*, 71 F.3d 502, 506 (5th Cir. 1995) (citation omitted); *see Leadon v. Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567, 569 (Tex. 1972) ("It is not essential that the negligent act or omission should have been expressly authorized by the employer so long as it is in furtherance of the employer's business and for the accomplishment of the object for which the employee is employed."); *Arbelaez v. Just Brakes Corp.*, 149 S.W.3d 717, 720 (Tex. App.--Austin 2004, no pet.) ("To ultimately prove that an employee acted within the course and scope of employment, however, [plaintiff] must [establish] that the act was (1) within the general authority given to the employee; (2) in furtherance of the employer's business; and (3) for the accomplishment of the object for which

"[t]o be within the scope of employment, the conduct must be of the same general nature as that authorized or incidental to the conduct authorized."[82] As a general rule, "[c]ourse and scope of employment is . . . a fact issue like negligence or proximate cause."[83] However, scope of authority may be a question of law in the absence of disputed questions of fact.[84]

Assuming *arguendo* that Wayne Mathews was Kent Mathews' agent for the purpose of "wrapping things up" around the Mathews' residence on the night of the cross-burning, the record is devoid of facts suggesting that Wayne acted within the scope of that authority when he participated in the cross-burning. Kent Mathews' testimony clearly demonstrates that when he told Wayne to "wrap things up," he intended for Wayne to send his friends home. Any suggestion that he implicitly gave Wayne authority to construct a large wooden cross on his lawn, transport that cross to the home of an African-American family, and set it on fire is the height of

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the employee was employed."); *Millan v. Dean Witter Reynolds, Inc.*, 90 S.W.3d 760, 767-68 (Tex. App.--San Antonio 2002, pet. denied) ("To determine whether an employee's acts are within the scope of his or her employment, we ask whether the employee's actions fall within the scope of the employee's general authority, are in furtherance of the employer's business, and are for the accomplishment of the object for which the employee was hired."); *Chesshir v. Sharp*, 19 S.W.3d 502, 504 (Tex. App.--Amarillo 2000, no pet.) ("Whether one is acting within the scope of his employment depends upon whether the general act from which injury arose was in furtherance of the employer's business and for the accomplishment of the object for which the employee was employed.").

[82] *Williams*, 71 F.3d at 506 (internal quotation marks and citations omitted).

[83] *Arbelaez*, 149 S.W.3d at 720.

[84] *See Gen. Prod. Co. v. Black Coral Invests.*, 715 S.W.2d 121, 123-24 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.).

absurdity. The fact that Mathews knew or should have known of his son's difficulties with alcohol does not alter this analysis; that Kent Mathews may have been negligent in delegating authority over his property to an untrustworthy son does not serve to expand the scope of authority given to encompass unimaginable criminal conduct wholly unrelated to the task assigned.

Relatedly, we have found that, under Texas law, an agent's "serious criminal activity" is almost never taken within the scope of authority granted by the principal:

> Indeed, an employee's willful and malicious actions made in the scope of his employment, or any acts which are so connected with and immediately grow out of another act of the employee imputable to the employer, are imputed to the employer *unless the employee's actions involve serious criminal activity*. Under the exception, an employer is not liable for the employee's intentional or malicious actions that are unforeseeable considering the employee's duties. Thus, even criminal acts can be in the course and scope and impute liability *if the acts are foreseeable considering the employee's duties*.[85]

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[85] *Williams*, 71 F.3d at 506 n.10 (emphasis added) (citations omitted); *see also Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773, 778 (Tex. App.--San Antonio 1995, writ denied) ("An exception to [the rule that a master is liable for his servant's willful or malicious acts taken within the scope of his employment], usually applied in cases involving serious criminal activity, is that an employer is not liable for intentional and malicious acts that are unforeseeable considering the employee's duties."); *Adami v. Dobie*, 440 S.W.2d 330, 334 (Tex. Civ. App.--San Antonio 1969, writ dism'd) ("A

There are no facts in the record suggesting that it was foreseeable to Kent Mathews that his son would commit an act of racial terrorism upon receipt of authority to "wrap things up." Indeed, the jury explicitly found that Wayne's acts were unforeseeable to Kent in its response to jury interrogatory 3.

Because the record contains no facts suggesting that Wayne Mathews' criminal activity was taken within the scope of authority granted him by Kent Mathews, we conclude that the district court's finding to the contrary was clearly erroneous. Accordingly, the district court abused its discretion in granting the Rosses' Rule 59(e) motion to amend the judgment.

VI

For the foregoing reasons, both the order denying intervention and the amended final judgment are REVERSED and this case is REMANDED with instructions to enter a take-nothing judgment as to Kent Mathews.

REVERSED and REMANDED.

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master is not liable for unauthorized intended tortious conduct of his servant, even when the act was done in connection with the servant's employment, where the wrongful act was unexpectable, in view of the duties of the servant.")

FILED JULY 11, 2006
Charles R. Fulbruge III Clerk,
United States Court of Appeals Fifth Circuit

In the United States Court of Appeals
For the Fifth Circuit

No. 03-20989

DWAYNE ROSS; MARIA ROSS, individually and as next friend of Sydney Ross and Johnathon Ross, minor children;
SYDNEY ROSS, minor child;
JOHNATHON ROSS, minor child,
Plaintiffs - Appellees,

versus

MATTHEW CURTIS MARSHALL; ET AL,
Defendants,

ALLSTATE TEXAS LLOYDS INSURANCE CO.,
Movant - Appellant.

Appeals from the United States District Court
For the Southern District of Texas

Before HIGGINBOTHAM, DAVIS, and GARZA, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The Rosses ask us to reconsider our decision allowing Allstate Texas Lloyds Insurance Company to intervene to challenge on appeal an adverse liability judgment entered against its insured, Kent Mathews. The Rosses contend that Allstate does not have a sufficient interest in the underlying litigation under Federal Rule of Civil Procedure 24(a). We disagree.

The interest required to intervene as of right is a "direct" interest.[1] By definition, an interest is not direct when it is contingent on the outcome of a subsequent lawsuit.[2] An insurer who defends its insured under a full reservation of rights provides a defense in the liability action, but reserves the right to contest coverage later.[3] When an insurer defends under a full reservation of rights, their interest in the liability lawsuit is contingent upon the outcome of the coverage lawsuit. That interest, without more, is insufficient for intervention.

But that is not the case here.To be sure, Allstate initially defended Kent Mathews under a full reservation of rights. Allstate denied coverage over Kent's negligence on the basis of a line of cases from our Court that held that the term "occurrence" in an insurance policy did not cover the insured's

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[1] Fed. R. Civ. Proc. 24(a); *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line* Co., 732 F.2d 452, 463 (5th Cir. 1984) (en banc).

[2] *See Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc., 725* F.2d 871 (2d Cir. 1984); *Travelers Indemnity* Co. *v. Dingwell,* 884 F.2d 629 (1st Cir. 1989).

[3] *See Arkwright-Boston Mfrs. Mut. Ins.* Co. *v. Aries Marine Corp.,* 932 F.2d 442, 445 (5th Cir. 1991).

negligence, when that negligence was premised on the intentional conduct of the insured's servant.[4] That argument was abandoned after the Texas Supreme Court's decision in *King v. Dallas Fire Insurance Company.*[5] There, the Texas Supreme Court rejected the Fifth Circuit's approach, instead interpreting the term "occurrence" to include coverage for an insured's negligence, even when premised on the intentional conduct of the insured's servant.[6] From that point on, Allstate defended Kent Mathews under a limited reservation of rights, accepting coverage for any negligent conduct while denying coverage for any intentional conduct.[7] Once Allstate accepted coverage over any negligence liability on the part of Kent Mathews, they had a direct interest in the liability lawsuit. Regardless of whether, in this case, Allstate's interest was sufficient to intervene without the acceptance of coverage, the interest was sufficient with it.

For these reasons, the petition for panel rehearing is DENIED.

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[4] *See, e.g., Am. States Ins.* Co. *v. Bailey,* 133 F.3d 363, 371-73 (5th Cir. (holding that "occurrence" in insurance policy did not include negligent supervision claim against church official for alleged intentional sexual misconduct of employees) .

[5] *See* Intervenor-Appellant Allstate Texas Lloyds Insurance Company's Response to Petition for Rehearing *En Banc,* at 3 n.2.

[6] *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 188 (Tex. 2002).

[7] *See* Intervenor-Appellant Allstate Texas Lloyds Insurance Company's Response to Petition for Rehearing *En Bane,* at 2-3.

United States Courts
Southern District of Texas
ENTERED
Aug 20, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Dwayne and Maria Ross,	§	
Ind., and as next Friends	§	
of Sydney Ross and	§	
Johnathon Ross,	§	
Minor Children,	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. H-01-1311
	§	
Matthew Curtis Marshall,	§	
Et. Al.	§	
Defendants.	§	

AMENDED FINAL JUDGMENT

After the parties announced ready, this case was tried to a jury. After the parties rested, the Court announced as a matter of law and undisputed fact that the five co-conspirators (defendants Matthew Marshall, Corydon Parsons, Wayne Mathews, Robert Bergeron and Darin White) were liable to the plaintiffs for state law claims of nuisance, trespass, invasion of privacy, and intentional infliction of emotional distress; and liable to the plaintiffs for federal claims of violation of the Fair Housing Act, violation of civil rights (42 U.S.C. § 1982) and

conspiracy to violate civil rights (42 U.S.C. § 1985) and common law civil conspiracy.

Thereafter, the Court submitted to the jury issues on the liability of the defendant Kent Mathews for negligent delegation of authority, defamation as to the five co-conspirators; malice as to the five co-conspirators; and actual and exemplary damages for each plaintiff. The plaintiffs nonsuited their claims against Sally Mathews. The Court finds that prior to trial, that the individual plaintiffs settled with Matthew Marshall for the total sum of $490,000. The Court credits the remaining defendants with a settlement credit by reducing the damages awarded to the individual plaintiffs in the respective the amount that each plaintiff received from defendant Marshall. The remaining defendants are, therefore, entitled to a credit in the amount of $5,000 as to Dwayne Ross; $475,000 of the damages as to Maria Ross; $5,000 as to Sydney Ross; and $5,000 as to Johnathon Ross.

In answer to Jury Interrogatory No.1, the jury found that the defendant Kent Mathews had delegated his authority over the Mathews' property to Wayne Mathews on the night in question, and that such delegation constituted negligence. However, the jury found that the negligence was not a proximate cause of the harm inflicted on the plaintiffs. Nevertheless, the Court concludes that it is undisputed that Wayne Mathews' use of the Mathews' property was within the scope of authority granted by Kent Mathews. Therefore, the Court holds that while Kent Mathews is not directly liable, he is, nevertheless, indirectly liable.

Having reviewed the jury findings and the evidence, this Court finds that judgment should be entered in the plaintiffs' favor. It is, therefore,

ORDERED that Dwayne Ross recover from the defendants Corydon Parsons, Wayne Mathews, Robert Bergeron, Darin White, and Kent Mathews jointly and severally, the sum of $4,397,996.65, which includes $3,626,086 in actual damages and $771,910.65 in prejudgment interest. This amount includes a reduction of actual damages because of the settlement credit. It is, further

ORDERED that Maria Ross recover from the defendants Corydon Parsons, Wayne Mathews, Robert Bergeron, Darin White, and Kent Mathews jointly and severally, the sum of $3,802,093.68, which includes $3,134,775 in actual damages and $667,318.68 in prejudgment interest. This amount includes a reduction of actual damages because of the settlement credit. It is, further

ORDERED that Sydney Ross recover from the defendants Corydon Parsons, Wayne Mathews, Robert Bergeron, Darin White, and Kent Mathews jointly and severally, the sum of $776,239.18, which includes $640,000 in actual damages and $136,239.18 in prejudgment interest. This amount includes a reduction of actual damages because of the settlement credit. It is, further

ORDERED that Jonathan Ross recover from the defendants Corydon Parsons, Wayne Mathews, Robert Bergeron, Darin White, and Kent Mathews jointly and severally, the sum of $181 ,934.70, which includes $150,000 in actual damages and $31,934.70 in prejudgment interest. This amount includes a reduction of actual damages because of the settlement credit. It is, further

ORDERED that Dwayne Ross recover exemplary damages from Corydon Parsons the sum of $2,600,000; from Wayne Mathews the sum of $975,000; from Robert Bergeron the sum of $162,500; and from Darin White the sum of $162,500. It is, further

ORDERED that Maria Ross recover exemplary damages as follows from Corydon Parsons the sum of $2,600,000; from Wayne Mathews the sum of $975,000; from Robert Bergeron the sum of $162,500; and from Darin White the sum of $162,500. It is, further ORDERED that Sydney Ross recover exemplary damages from Corydon Parsons the sum of $650,000; from Wayne Mathews the sum of $243,750; from Robert Bergeron the sum of $40,625; and from Darin White the sum of $40,625. It is, further ORDERED that Jonathan Ross recover exemplary damages from Corydon Parsons the sum of $650,000; from Wayne Mathews the sum of $243,750; from Robert Bergeron the sum of $40,625; and from Darin White the sum of $40,625. It is, further ORDERED that the plaintiffs recover from the defendants, jointly and severally, reasonable and necessary attorneys fees of $738,187.50 for preparation and trial of the case; $25,000.00 if the case is appealed to the United States Court of Appeals for the Fifth Circuit; and $15,000.00 if the case is appealed to the United States Supreme Court. It is, further

ORDERED that the plaintiffs recover from the defendants, jointly and severally, their costs incurred herein. It is, further

ORDERED that the defendants shall pay post-judgment interest at the rate of 1.29% on all damages assessed in this judgment from the date that this judgment is signed until this judgment is paid in full.

This is a Final Judgment. All relief not expressly granted is DENIED.

Signed this 19th day of August, 2003.

/s/ Kenneth M. Hoyt
United States District Judge

United States Court of Appeals
Fifth Circuit
FILED
July 11, 2006
Charles R. Fulbruge III, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Dwayne and Maria Ross,	§	
Ind., and as next Friends	§	
of Sydney Ross and	§	
Johnathon Ross,	§	
Minor Children,	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. H-01-1311
	§	
Matthew Curtis Marshall,	§	
Et. Al.	§	
Defendants.	§	

ORDER

The Court ORDERS as follows:

The motion to intervene of Allstate Texas Lloyds Insurance Company is DENIED.

The post-judgment answer of intervenor and defendant Allstate Texas Lloyds Insurance Company's notice of appeal are STRICKEN. The plaintiffs motion for sanctions is denied without prejudice.

Signed this 12th day of September, 2003.

/s/ Kenneth M. Hoyt
United States District Judge

No. 06-516

Supreme Court, U.S.
FILED
JAN 5 - 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

**DWAYNE ROSS, MARIA ROSS,
Individually and as Next Friends of
SYDNEY ROSS and JOHNATHON ROSS, Minor Children;
SYDNEY ROSS, Minor Child;
JOHNATHON ROSS, Minor Child,**

Petitioners,

v.

**ALLSTATE TEXAS LLOYDS
INSURANCE COMPANY,**

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

REPLY TO BRIEF IN OPPOSITION

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Petitioners file this brief in reply to the Brief in Opposition filed by Respondent, Allstate Texas Lloyd Insurance Company ("Allstate"), and in support of their request that this Court grant this petition for writ of certiorari.

REASONS TO GRANT THE PETITION

I. The Bench And Bar Need Clear Guidelines About What Constitutes Intervention As A Matter of Right.

This Court should grant this petition to clarify the confusion in the courts over the proper construction of intervention as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. This Court has not discussed that rule in over forty years. In the two decisions in which the Court did discuss the rule, the Court contributed to the confusion.[1] This case presents the questions on the construction of Rule 24(a)(2) in sharp relief against a background of a straightforward record.

In this case, Allstate refused to post a supersedeas bond[2] to protect its insured's assets from execution while its insured's appeal from the judgment was pending. For that reason, its insured, Kent Mathews, fired the attorneys that Allstate hired to defend him, entered into a deal with the Plaintiffs to protect his assets and dismissed his appeal from the judgment. Allstate, to "protect its monetary interest in the case" filed a post-judgment motion to intervene (CR 2845).

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[1] Leading commentators note that the *El Paso* opinion "adds confusion in the field of intervention" and that courts and commentators refuse to regard it as "significant precedent," while the *Donaldson* opinion "also has its perplexing qualities." *See* Charles A. Wright, Arthur R. Miller, Mary Kay Kane, 7C FEDERAL PRACTICE & PROCEDURE §1908 (2006) (hereafter "Wright & Miller"); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 730 (February, 1968); *see also Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Donaldson v. United States*, 400 U.S. 517 (1971).

[2] The judgment was for over $10 million. Allstate attempted to post a supersedeas bond for $300,000. The district court denied this insufficient security. Allstate has not challenged that denial on appeal. Thus, there was no supersedeas bond in place to protect Kent Mathews' assets from execution while he pursued an appeal. It was for that reason that he entered into the best deal he could get with the Plaintiffs.

Allstate sought to protect its coverage interests – interests that were already being preserved in the separate suit that Allstate had filed against Kent Mathews. The district court denied Allstate's untimely motion to intervene. The Fifth Circuit held that the district court was required to grant Allstate's motion to intervene **as a matter of right**[3] under Rule 24(a)(2). *See* FED. R. CIV. P. 24(a)(2).

Allstate argues that the construction of Rule 24(a)(2) should be "elastic," and "flexible," and "liberal," and "practical." The question presented here is how far does the rule stretch. Obviously, the rule is not so "elastic" that it stretches to cover every situation. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 500 (1975) ("Of course, no rule of law is infinitely elastic.").[4] As Mr. Justice Washington said long ago when discussing a similar argument that a patent could be construed to cover any and all things:

> [The argument is] that it may have a sort of elastic ambiguity, capable of contraction if not expansion, so as to adapt itself to whatever may be found convenient at any given time to embrace. This is against all settled principles; it is against good policy; and it is against the words and the spirit of the act of Congress.

Evans v. Eaton, 20 U.S. 356, 394 (1822).

Here, the central question is whether Allstate had an interest sufficient to require its intervention as a matter of

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[3] Allstate did not seek permissive intervention under FED. R. CIV. P. 24(b).

[4] *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134 (1967) ("We therefore know that some elasticity was injected and the question is, how much.").

right.[5] However, there is no clear definition of what that interest is. As the leading commentators state, "[t]here is not as yet any clear definition, either from the Supreme Court or from lower courts, of the nature of the 'interest relating to the property or transaction which is the subject of action' that is required for intervention of right."[6] Clearly, the required interest cannot be some "undifferentiated, generalized interest" for that would be "too porous a foundation on which to premise intervention as of right." *See Public Serv. Corp. of New Hampshire v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998). And, equally clearly, the rule does not provide "carte blanche intervention by anyone at any time." *See Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969). But, beyond that, courts have little guidance on how to define the nature of the interest required for intervention as of right. *See Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder*, 72 F.3d 361, 366 (3d Cir. 1995) ("[T]he precise nature of the interest required to intervene as of right has eluded precise and authoritative definition.").

This case gives the Court the unique opportunity to clearly define the nature of the interest required for intervention as a matter of right. As demonstrated by the conflicts among the Circuits, such guidance is not just helpful, but necessary.

II. There Is A Direct And Irreconcilable Conflict Among The Lower Courts About Whether An Insurer Can Intervene In An Action Against Its Insured To Protect Its Coverage Interests.

Both the Fifth Circuit below and Allstate in its brief tried to minimize the direct and irreconcilable conflict between the holding below and the opinions of other courts. There are legions of cases that hold that an insurer cannot intervene as a matter of right in a case against its insured so as

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[5] Allstate says that this is the only question. It is not. As can be seen by the questions presented, an unbriefed issue is whether Allstate's post-judgment motion to intervene was "timely" – another requirement of Rule 24.

[6] Wright & Miller, *supra* n.1, at §1908.

to avoid coverage.[7] In fact, even cases that pre-dated the 1966 amendments held that a liability insurer could not intervene in an action against its insured in order to protect its coverage interests.[8] On the other hand, prior to this opinion, there were no cases that held that an insurer can intervene post-judgment to appeal a judgment against its insured in order to minimize the insurer's own liability under the policy.[9] The cases that Allstate cited to support its position involve insureds attempting to intervene in an insurer's declaratory judgment action,[10] an insurer intervening to challenge a settlement,[11] and a case that actually holds that an insurer cannot intervene as of right to contest the insured's liability.[12]

Two cases from other Circuits are in direct and irreconcilable conflict with the Fifth Circuit's opinion below. The first is *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989). In that case, Dingwell's plant was sued for

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[7] *See, e.g., Travelers Indem. Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989); *Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871 (2d Cir. 1984); *Nieto v. Kapoor*, 61 F.Supp.2d 1177 (D.N.M. 1999); *Bolden v. O'Connor Café of Worcester, Inc.*, 50 Mass. App. Ct. 56, 69, 734 N.E.2d 726, 737 (Mass. App. 2000); *State Farm Fire and Cas. Co. v. Taylor*, 706 S.W.2d 352, 352-53 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.); *O'Bannon v. Northern Petrochemical Co.*, 113 Ill. App. 3d 734, 737-738 (Ill. App. Ct. 1983).

[8] *See Kelley v. Pascal System, Inc.*, 183 F.Supp. 775, 777 (E.D. Ky. 1960) ("The liability of the insurance company is only potential and may never arise even though the liability of the insured is fixed in this action.").

[9] Relying on the Fifth Circuit's opinion below, the Texas Supreme Court allowed an insurer to intervene in a mandamus action. *See In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718 (Tex. 2006).

[10] *Bituminous Casualty Corp. v. Garcia*, 223 F.R.D. 308 (N.D. Tex. 2004).

[11] *H.B.H. v. State Farm Fire & Casualty Co.*, 170 Ariz. 324, 329-30, 823 P.2d 1332, 1337-38 (Ariz. App. 1991).

[12] *Bridge v. Air Quality Tech. Serv., Inc.*, 194 F.R.D. 3, 6 (D. Me. 1999) ("Since Gulf does not have sufficient interest warranting intervention, the Court, in denying Gulf's motion to intervene on the question of liability, need not consider the other factors necessary for intervention.").

environmental violations. In exchange for a waiver of personal liability, Dingwell entered into a consent decree in which he agreed to pay 65% of the cleanup costs and assigned his rights of indemnification against his insurers to the plaintiffs. Dingwell's insurers, as here, sought to intervene as a matter of right to protect their contingent coverage interests. The district court, as here, denied intervention.

The insurers argued on appeal, as here, that they had an interest in minimizing Dingwell's liability. The First Circuit held that since the insurers had reserved their rights to deny coverage, that interest was contingent. "When the insurer offers to defend the insured but reserves the right to deny coverage, . . . the insured's interest in the liability phase of the proceeding is contingent on the resolution of the coverage issue." *Id.* at 638 (citing cases). The First Circuit also held that the insurers' "coverage" interests were "not related to the subject matter of the action between the Group and Dingwell." *Id.* at 640. In rejecting the same arguments advanced by Allstate here, the First Circuit held that the insurers "did not have a cognizable interest in the subject matter of the lawsuit, and . . . that the district court correctly denied the motions for intervention under Rule 24(a)(2)." *Id.* at 641.

The Second Circuit reached a similar result in 1984. *Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871 (2d Cir. 1984). In that case, as here, Certified's insurer, Unigard, defended under a reservation of rights and sought to intervene in the suit to protect its coverage interests. It sought to intervene "after a general verdict for the plaintiff" so that it could submit questions to the jury to answer its coverage questions. *Id.* at 873-74. The district court denied intervention and the Second Circuit affirmed. The Second Circuit held that Unigard's interest in the amount it would have to pay if the plaintiff won is not related to the subject matter of the action between Restor-A-Dent and Certified. *Id.* at 875. Further, Unigard's interest was contingent on a later finding of liability for indemnification. *Id.* at 876. Because an interest "must be direct, as opposed to remote or contingent," the Second Circuit held that the insurer did not meet the

interest requirement to intervene as a matter of right under Rule 24(a)(2). *Id.; see also Bolden v. O'Connor Café of Worchester*, 50 Mass. App. Ct. 56, 734 N.E.2d 726 (Mass. App. 2000) (denying insurer's post-judgment motion to intervene under Rule 24(a)(2) to appeal a $20 million judgment after insured defendant entered into a covenant not to execute and assignment of claims against his insurer).

The Fifth Circuit attempted to distinguish those opinions in two ways. First, the Fifth Circuit attempted to carve out a difference by saying that in the other cases, the insurer attempted to intervene *before* the judgment. (*See* App. 1, at 25). However, that is a distinction without a difference since, in both other cases, the insurer sought to intervene *after* the liability was determined – in *Travelers*, the insurer's motion to intervene came after the insured's entry into a consent decree,[13] and in *Restor-A-Dent*, the insurers' motion to intervene expressly sought intervention "after a general verdict for the plaintiff, should there be one . . . ."[14] Second, the Fifth Circuit attempted to argue that while in both cases there were contingencies, that the contingencies were less in the present case because the insured's liability had been determined (*See* App. 1, at 25-26). The reason that this so-called distinction makes no sense is that a contingent interest is not sufficient, no matter what the degree, to satisfy the required interest for intervention as a matter of right. *See Vermejo Park Corp. v. Kaiser Coal Corp.*, 998 F.2d 783, 790-791 (10th Cir. 1993) ("The mere existence of a third person's contingent interest in the outcome of pending litigation is insufficient to warrant intervention of right.").

Thus, there is a direct and irreconcilable conflict among the Circuits that requires this Court's resolution.

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[13] *Travelers*, 884 S.W.2d at 638.

[14] *Restor-A-Dent*, 725 F.2d at 874.

III. Allstate's So-Called "Practical Reasons" To Intervene Are Insufficient To Justify Intervention As A Matter Of Right.

In its brief in opposition, Allstate asserts a number of "practical reasons" to justify intervention as a matter of right. Such "practical" arguments are yet another attempt to blur the limits of intervention. None has merit.

A. Allstate forsook its "contractual interests" when it breached its duty to defend its insured from the judgment.

Interestingly, Allstate begins by arguing that by intervening to appeal the judgment it was merely pursuing its contractual duty to defend Kent Mathews. That is interesting, first of all, because it was not the interest that Allstate asserted in its motion to intervene in the district court—which was to protect its **own** monetary interests (CR 2845). And, when subjected to scrutiny, the argument makes no sense.

Allstate has a duty to defend its insured, Kent Mathews, in the trial court **and** on appeal.[15] However, part and parcel of the duty to defend is the duty to post a full supersedeas bond to protect the insured's assets from execution while the appeal is pending.[16] Without a supersedeas bond to protect the insured's assets from execution while the judgment is being appealed, the duty to defend is illusory. In this case, Allstate breached its duty to defend by refusing to post the full amount of the supersedeas bond. When an insurer breaches its duty to defend, the insured is free to do whatever he must do—including entering

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[15] *Gibbons-Markey v. Texas Medical Liability Trust*, 163 Fed. Appx. 342, at *4 (5th Cir. 2006) (citing 22 Eric M. Holmes, HOLMES' APPLEMAN ON INSURANCE §136.11 (2d ed. 2003)); *Waffle House, Inc. v. Travelers Indemnity Co. of Illinois*, 114 S.W.3d 601, 611 (Tex. App.—Fort Worth 2003, pet. denied).

[16] *See, e.g., Commercial Casualty Ins. Co. v. Fruin-Colnon Contracting Co.*, 32 F.2d 425, 427-428 (8th Cir. 1929); *Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co.*, 240 F. 36, 40-41 (9th Cir. 1917).

into an agreement with the plaintiff, as here—to protect himself.[17]

In this case, the insured did just that. Abandoned by his insurer, Kent Mathews dismissed his appeal and entered into an agreement with the plaintiffs, an agreement that protected his interests while assigning his rights against his insurance company. No, A"state was not acting on behalf of Kent Mathews to protect his interests—he had already protected his interests when Allstate refused to protect him. Allstate was not stepping into his shoes; it was attempting to protect its own.

B. Allstate's "coverage interests" are insufficient to warrant intervention because they are contingent on the resolution of a separate suit.

Another of Allstate's "interest" arguments is that because it may provide coverage, it has an interest in the determination of liability. However, the simple fact is that Allstate will have an interest in liability only IF coverage is found. As noted, numerous courts have held that this contingent interest is insufficient to warrant intervention as a matter of right. *See Travelers Indem. Co. v. Dingwell,* 884 F.2d 629, 640 (1st Cir. 1989) ("This lawsuit involves the apportionment of tort liability, not the respective rights and obligations of an assured and his insurers under their insurance policy . . . [W]e will not allow the insurers to bootstrap their coverage defenses onto this lawsuit.").

C. Allstate's additional expenses or inconvenience is insufficient to warrant intervention as of right.

Finally, Allstate argues that, as a "practical" matter, Allstate's interests are impeded or impaired because litigation in a second lawsuit would result in "more time consuming

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[17] *Ideal Mut. Insurance Co. v. Myers,* 789 F.2d 1196, 1200 (5th Cir. 1986) ("It is settled that once an insurer has breached its duty to defend, the insured is free to proceed as he sees fit; he may engage his own counsel and either settle or litigate, at his option.").

and costly litigation[18] and further appeals to the Fifth Circuit ..." However, that argument runs contrary to the well-settled rule that if an interest is not "impaired or impeded" if it can be asserted in a separate lawsuit.[19] It is noted once again that Allstate has a separate pending declaratory judgment action in which it can assert the interests that it sought to protect on intervention. It is also well settled that the "mere inconvenience" of the costs and the time to pursue a separate action is "not the sort of adverse practical effect contemplated by Rule 24(a)(2). *See Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir. 1977); *SEC v. Everest Management Corp.*, 475 F.2d 1236, 1239 (2d Cir. 1972).[20]

D. Negligence played no role in this case.

Allstate also tries to make some hay with the argument that because it accepted liability for negligence, it had a direct stake in the judgment. That argument is specious, at best. The jury found no proximate cause, so negligence was not, and could not be, the basis of liability. Instead, the judgment against Kent Mathews was based on liability under a theory of agency, as the Fifth Circuit found when it analyzed the judgment on the merits. (*See* App. 1, at 34-38).

IV. The Fifth Circuit's Opinion Represents Unsound Policy.

There are compelling reasons to grant this petition. First, the opinion below represents extremely bad precedent. By law in every state and federal Circuit, an insurer is duty bound to protect the interests of its insured. The opinion below allows an insurer to forsake those interests. The

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[18] Of course, defending Allstate's improvident post-judgment intervention in this suit, both in the district court and on appeal, has proved very costly to the original parties to the litigation.

[19] Wright & Miller, *supra* note 1, at §1908 (citing cases which held that the interest was not impaired "when the court finds that the would-be intervenor could protect its interest in a separate action.").

[20] *Id.* ("the practical disadvantage of filing a separate suit and perhaps duplicating some of the efforts of the ongoing litigation are not sufficient to meet the criteria of the rule.").

opinion allows an insurer to wait until a judgment is entered in a suit against its insured and then, if the judgment is adverse, to refuse to post a supersedeas bond to protect its insured's assets, but to intervene itself as a party **as a matter of right**, post-judgment, not to protect the interest of its insured, but to protect its own coverage interests.

Second, the opinion below further conflates the confusion in construction of Rule 24(a)(2). Prior to the opinion below, courts held that an insurer **could not** intervene as a matter of right to protect is own contingent coverage interests. With this opinion, however, the Fifth Circuit has held that some contingent interest is okay. One cannot know, in viewing this turbulent sea of authority, where the definition of "interest" will come to rest.

This Court's intervention is needed to properly define the rule so that courts and litigants know when intervention as a matter of right is proper. The rule cannot be as infinitely elastic as Allstate would suggest. To have any meaning, the rule must have limits. This Court should set those limits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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